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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 913

FLOYD SARISOHN,

Petitioner,

—against—

THE APPELLATE DIVISION OF THE SUPREME COURT, SECOND DEPARTMENT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No.

FLOYD SARISOHN,

Petitioner,

—against—

THE APPELLATE DIVISION OF THE SUPREME COURT,
SECOND DEPARTMENT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the final judgment of the Court of Appeals of the State of New York entered on June 14, 1968, which affirmed an order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, the respondent herein, entered on December 27, 1967, removing petitioner from his public office as a Judge of the District Court of Suffolk County, State of New York, and prohibiting him from thereafter holding any judicial office, appointive or elective.

Citations to Opinions Below

The opinion of the respondent, Appellate Division, dated November 28, 1966, printed in Appendix C, *infra,* p. 20a, is reported in 26 A.D. 2d 388 and in 275 N.Y.S. 2d 355, motion for leave to appeal denied 19 N.Y. 2d 689, 224 N.E. 2d 566. The opinion of the respondent, Appellate Division, dated May 15, 1967, printed in Appendix C, *infra,* p. 24a, is reported in 27 A.D. 2d 466 and in 280 N.Y.S. 2d 237. The opinion of the Court of Appeals, State of New York, dated December 7, 1967, printed in Appendix C, *infra,* p. 33a, is reported in 21 N.Y. 2d 36 and in 233 N.E. 2d 276. The opinion of the respondent, Appellate Division, dated December 27, 1967, printed in Appendix C, *infra,* p. 45a, is reported in 29 A.D. 2d 91 and in 286 N.Y.S. 2d 336. No opinion was rendered by the Court of Appeals, State of New York, in connection with its judgment of June 14, 1968, which is sought to be reviewed herein, but the decision of the Court is reported in 22 N.Y. 2d 808 and in 239 N.E. 2d 649. Opinions in related cases, but not directly involved herein, are reported in 265 F. Supp. 455 (E.D.N.Y.) and in 53 Misc. 2d 1081, 291 N.Y.S. 2d 475.

Jurisdiction

The judgment of the Court of Appeals of the State of New York for which review is sought herein, was entered on June 14, 1968. (Appendix D, *infra*) Timely application for rehearing, made on August 16, 1968, was denied on October 9, 1968. (Appendix B, *infra*) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3) since the petitioner's rights, privileges and immunities under the Constitution of the United States are claimed to have been violated, and further, since the validity of state statutes and constitutional provisions, especially as applied to the petitioner, on grounds of repugnancy to the Constitution of the United States, are drawn in question.

Questions Presented

I. Was the petitioner denied a fair hearing before an impartial tribunal in violation of his rights, privileges and immunities under the Fourteenth Amendment of the Constitution of the United States, during a certain trial held by the respondent court which resulted in the respondent removing the petitioner from his state elective office as a Judge of the District Court and barring him for life from ever again holding any other judicial office, when, *inter alia*:

(a) the respondent determined that cause existed to warrant an investigation of petitioner's conduct;

(b) the respondent ordered the investigation and appointed its own prosecuting counsel to conduct it;

(c) the respondent preferred the charges against the petitioner, which it deemed sufficient to constitute cause for his removal from office, and thereafter presided over the trial and passed judgment;

(d) the respondent made itself a party to the proceedings by virtue of charging the petitioner of committing against it acts tantamount to criminal libel;

(e) the respondent knowingly used concededly illegal wiretap evidence against petitioner and, after being reversed for this reason by the Court of Appeals, refused to disqualify itself on the remand;

(f) the respondent failed to give petitioner notice as to the reach of the proceedings and of the precise nature of the charges.

II. Are the state constitutional and statutory provisions which establish the procedure and reason for the removal

of a Judge of the District Court repugnant to the Fourteenth Amendment of the Constitution of the United States, especially as they have been applied herein by the respondent court?

State Constitutional and Statutory Provisions Involved

Article 6, Section 22(i) of the New York State Constitution, Section 132 of the Code of Criminal Procedure (McKinney's Consolidated Laws of New York, Annotated, Book 6, Part 1) and Section 103(e) of the Uniform District Court Act (McKinney's Consolidated Laws of New York, Annotated, Book 29A, Part 3) are the state constitutional and statutory provisions involved. They are printed in Appendix A, *infra*, p. 1a.

Statement of the Case

On January 1, 1964, the petitioner took office as an elected Judge of the District Court of Suffolk County. On August 12, 1966, the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, the respondent herein, made a preliminary determination that cause existed to order an investigation concerning the petitioner's conduct and thereupon ordered such an "investigation". (A23)* The respondent designated an independent referee to conduct the investigation, and pending such investigation, directed the petitioner to be relieved of his duties. (A24)

Thus being relieved of his duties for then unknown and unstated reasons, the petitioner was left in the dark until August 26, 1966, when the respondent, through its appointed prosecuting counsel, finally preferred a series of

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* References are to pages of the Appendix (A) and to the Supplemental Appendix (S.A.) before the Court of Appeals.

formal charges allegedly "constituting cause for his removal from office". (A26-A37)

As confessed by the respondent's prosecuting counsel (Affidavit of Reginald C. Smith, sworn to January 3, 1967, p. 7), "Mr. Justice Fred J. Munder, recently appointed to the Appellate Division by the Governor, acted until the end of 1966 as the Administrative Judge of Suffolk County.* He not only received the original group of charges but has counseled me, from time to time, and properly so, in respect to the form and content of the formal charges . . .".

One of these charges, which the respondent predetermined would constitute cause for petitioner's removal from office, charged that "on various dates from August 15, 1966 to August 20, 1966" during the period when the petitioner was relieved of his duties, but left in the lurch as to the reasons therefor, he "*made false and reckless statements* to newspaper reporters and sought publication thereof charging base and improper motives for the investigation of his conduct" (A37), by virtue of which "all of the judges of the Appellate Division and the Court itself, *were discredited.*" (A61; emphasis added)

Thereafter, prior to the commencement of any formal hearings, the petitioner brought on a motion, amongst others, before the respondent, to disqualify itself, on the grounds that the respondent court had a personal interest in the proceeding "beyond that of regulating the conduct of a Judicial Officer", and had furthermore placed itself in the position of "accuser, prosecutor and judge", thereby precluding the petitioner from having "a fair and impartial trial or hearing". (A92-A93) The respondent de-

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* The Administrative Judge is appointed by and serves at the pleasure of the Appellate Division. Judiciary Law, §217 (McKinney's Consolidated Laws of New York, Annotated, Book 29).

nied the motion (A94-A95), and the petitioner thereupon moved in the Court of Appeals for permission to appeal. (A96) While this motion was pending, the respondent, *ex parte,* struct out and deleted the charge, amongst others, that the petitioner had "discredited" the court, and directed that a hearing on the remaining charges be held by it, in lieu of the previously designated independent referee, designating five of its own "discredited" Justices to sit. (A98-A101) The Court of Appeals shortly thereafter denied the motion for leave to appeal (A102), and the petitioner was then ordered to trial before the respondent court. (A103)

After the trial, the respondent ordered, on May 15, 1967, that the petitioner be removed as Judge of the District Court and that he further be prohibited from ever holding any other judicial office. (A4-A5) The Notice of the Charges only advised the petitioner that the purpose of the proceeding was to seek his removal from his current judicial office. (A26, A63)

The respondent based its decision upon a finding of culpability as to several of the charges which when taken together, in the respondent's opinion, showed a pattern of misconduct which pattern came within the compass of "cause".

The respondent also held that removal was justified, in any event, because petitioner relied upon his privilege against self-incrimination when testifying in respect to the first and most serious of charges on which he was found guilty, concerning alleged advice given in telephone conversations with a client of his law office. Such conversations transpired two years before petitioner became a District Court Judge, while he was both a practising attorney and a justice of the peace.* (Appendix C, *infra,*

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* New York State Justices of the Peace are not precluded from practising law. Justice Court Act, §492-a (McKinney's Consolidated Laws of New York, Annotated, Book 29A, Part 2). A District Court Judge cannot practice law. (Uniform District Court Act, §103 (d)(4)) (McKinney's, *supra,* Book 29A, Part 3).

p. 35a) Transcripts of these conversations were obtained by the tapping of the former client's telephone, which interceptions were made pursuant to certain court orders, allegedly obtained under Section 813-a of the state's Code of Criminal Procedure. (Appendix C, *infra,* p. 35a)

Separate and apart from the constitutional significance of wiretapped evidence at the time of the trial, the wiretap orders were admittedly invalid and illegal under New York law (A121-A147), as testified to at the trial by the police inspector who obtained the orders:

> "Q. Weren't you told that this was insufficent as a matter of law?
> A. Yes, sir.
> Q. When were you told that, officer?
> A. I always knew that, sir.
> Q. For how many years, sir?
> A. Well, from 1951 to the present time."
>
> * * *
>
> Q. You knew, did you not, Officer, that these petitions which you submitted and about which you have testified here today were insufficient to obtain a wiretap order, legally insufficient?
>
> Mr. Klein: He has so testified." (A133-A134)

Notwithstanding their patent, declared illegality, the respondent court, over strenuous objection (A149), accepted the wiretaps into evidence. Solely as a result of considering this illegal evidence, the respondent held that the petitioner had given improper advice to the former client, a prostitute, in regard to her occupation. (Appendix C, *infra,* pp. 26a-27a)

On his appeal to the Court of Appeals, the petitioner, after referring to the respondent court's deliberate use of the illegal wiretaps and its offer into evidence by the

prosecuting arm of the respondent court, one of its self-appointed prosecuting counsel, Mr. Klein, once again argued that the respondent should be deemed to have been disqualified as a result of its ubiquitous involvement in the proceedings. (Appellant's Brief before Court of Appeals, pp. 32-37).

On December 7, 1967, the Court of Appeals unanimously reversed the May 15, 1967 removal order because of respondent's use of the patently illegal wiretaps. Without even reaching the constitutional issue raised by the then recent decision in *Berger* v. *New York*, 388 U.S. 41, the Court held that the wiretap orders were "concededly insufficient" under the New York statute, and hence should never have been used by the respondent court. The Court also held that the petitioner should never have been put into the position of having to invoke his privilege against self-incrimination since the "claims of privilege arose . . . only in connection with the first charge", embracing the wiretapped evidence. Accordingly, the Court of Appeals remanded, with the direction that respondent "reconsider the disposition to be made on the basis of the remaining charges" since,

> "Abstracting from the case the first charge (involving the dealings with the prostitute) and the claims of privilege associated with that charge *would take away a substantial part of the basis upon which the Appellate Division acted.*" (Appendix C, *infra,* p. 43a; emphasis added)

On the remand, the petitioner renewed his prior motion that the respondent disqualify itself for all the reasons previously asserted, and for the additional reason that there now existed additional bias, as a matter of law, in violation of his federal constitutional rights "as a consequence of the Justices comprising the Court having priorly

sat in judgment in the same proceeding and upon the further ground that the illegal evidence formed a substantial part of the Court's prior decision and is of such a highly prejudicial character as to preclude, as a matter of law, the proper detachment which is necessary to now pass further judgment upon the (petitioner) herein." (S.A. 456-S.A. 458)

The respondent court denied the motion, complied with the Court of Appeals' direction to dismiss the first charge, refused to allow the petitioner the right to call witnesses in his behalf as to the remaining charges, and summarily re-established the exact same punishment, *nunc pro tunc*. (Appendix C, *infra*, pp. 45a-48a) The Court of Appeals affirmed on June 14, 1968. Motion for re-argument was denied on October 9, 1968. Thereafter, the Court of Appeals amended its remittitur to the respondent court by certifying that: (Appendix B, *infra*, p. 4a)

> "Upon the appeal herein there were presented and necessarily passed upon the following questions under the Constitution of the United States: (1) whether appellant was deprived of due process and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, and (2) whether subdivision i of section 22 of Article 6 of the Constitution of New York State, subdivision e of section 103 of the Uniform District Court Act of the State of New York and section 132 of the Code of Criminal Procedure of the State of New York violated the Fourteenth Amendment to the Constitution of the United States. The Court of Appeals held that there was no violation of the Fourteenth Amendment to the Constitution of the United States."

Reasons for Granting the Writ

1. No mortal being, whether a murderer (*Chambers* v. *Florida*, 309 U.S. 277), an alien (*Wong Yang Sung* v. *McGrath*, 339 U.S. 33), a child (*Application of Gault*, 387 U.S. 1) or any other creature, has ever been punished in this Country by a process of law resembling that which has been employed in the removal of the petitioner from his judicial office.

While a judicial officer, and public officers in general, should properly be held to a higher standard of conduct than the ordinary citizen, no civilized judicial system can rightly deny to any of its subjects, be they poor or rich, noble or ignoble, a procedural process of law by which the accused may have a fair opportunity to vindicate himself against challenges to the quality and character of his life.

Nor can an absence of such procedural due process be justified on the pretense of enhancing the administration of justice, for to engage in such facile rationalization will invite the temptation to arbitrarily exalt the judicial system and to anoint it with powers which no society can justifiably confer upon those whom it empowers with the right to pass lawful judgment upon its members.

The constitutional concept of granting to an accused a "fair trial in a fair tribunal" (*In re Murchison*, 349 U.S. 133, 136) by a panel of impartial "indifferent" jurors is axiomatically accepted as comprising the very "minimal standards of due process". *Irvin* v. *Dowd*, 366 U.S. 717, 722.

The petitioner asks this Court to determine whether the condition of being a Judge excuses compliance with these minimal constitutional standards.

In this case, the respondent court engaged in every conceivable facet of the judicial process except sitting as an

appellate court in review of its own judgment. The ubiquitousness of its presence manifested itself as follows:

(1) The respondent acted as a grand jury when it determined that cause existed for relieving petitioner from his judicial duties and for preferment of charges against him.

(2) The respondent acted as a prosecutor in conducting an investigation concerning petitioner's conduct; in designating the prosecuting counsel, and in permitting its Administrative Judge to counsel its prosecuting counsel "in respect to the form and content of the formal charges."

(3) The respondent made itself a party to the proceeding, and henceforth personally interested in the outcome, by preferring, as cause for removal, the charge that by virtue of petitioner's criticism to the press of the respondent's investigation, "all of the judges of the Appellate Division and the Court itself, were discredited."

(4) The respondent discharged the impartial referee it had appointed to conduct the hearing, after the petitioner moved to disqualify the respondent from involving itself in the proceedings; thereafter substituted itself for the impartial referee, and passed judgment on the petitioner's culpability.

(5) The respondent knowingly permitted "concededly" illegal wiretaps into evidence which wiretaps served as the "substantial part of the basis upon which the Appellate Division acted." (Appendix C, *infra,* pp. 36a, 43a)

(6) The respondent insisted on sitting in judgment on the remand from the Court of Appeals after it had been reversed because of its use of the concededly illegal wiretap evidence.

No judicial tribunal has ever conferred such powers upon itself. Cf. *Matter of Friedman,* 12 N.Y. 2d (a), ap-

peal dismissed, 375 U.S. 10*; *Matter of Osterman,* 13 N.Y. 2d (a), certiorari denied, 376 U.S. 914** While, as in *Osterman* and *Friedman, supra,* the New York Court on the Judiciary, when convened, sits both as judge and jury on removal proceedings involving higher court judges, the state's procedures are there elaborately designed to detach this tribunal from the accusatory element of the proceeding and to constitute the Court in the most impartial style. (N.Y. Const. Art. 6, Sec. 22, subd. a-f)

Unlike this respondent court, the Court on the Judiciary functions and is convened, as in *Osterman* and *Friedman,* after investigations have been conducted by an agency independent of the Court, and after such an agency has preferred charges. The Court on the Judiciary's concern about avoiding the combination of roles of accuser and judge was clearly revealed in *Matter of Sobel and Leibowitz,* 8 N.Y. 2d (a), where the judges who were to sit had also been members of the agency which had preferred the charges, but fortuitously retired before the Court convened. As stated by the Clerk of the Court,

> "By these fortuitous changes the first convening of the Court on the Judiciary was spared the necessity of considering the possible disqualification of the Chief Judge of the Court of Appeals and all of the Presiding Justices of the Appellate Division by reason of their participation, as members of the Judicial Conference, in the resolution of censure." (Raymond J. Cannon, *The New York Court on the Judiciary 1948 to 1963,* 28 Albany Law Review 1, 4.)

Contrary to the fashion in which the Court on the Judiciary attempts to discharge its sensitive functions,

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* Mr. Justice Black was of the opinion that probable jurisdiction should have been noted.

** Mr. Justice Douglas was of the opinion that certiorari should have been granted.

the naked exercise of power by the respondent court in the present case constitutes one of the most flagrant violations of an individual's rights to procedural due process of law, far exceeding the circumstances of cases such as *In re Murchison,* 349 U. S. 133, where this Court stated:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But *our system of law has always endeavored to prevent even the probability of unfairness.* To this end *no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.* That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "Every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law." Tumey v. State of Ohio, 273 U. S. 510, 532, 47 S. Ct. 437, 444, 71 L. Ed. 749. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the very best way "justice must satisfy the appearance of justice." Offutt v. United States, 348 U. S. 11, 14, 75 S. Ct. 11, 13.
>
> *It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations.* * * * Fair trials are too important a part of our free society to let prosecuting judges

> be trial judges of the charges they prefer." (349 U. S. at 136-137; emphasis added.)

The interest which the respondent had in the present case in excess of its "traditional" role when acting as a disciplinary court over inferior court judges, can be defined with exact precision. In charging the petitioner with making "false and reckless statements to newspaper reporters" critical of its official acts, the respondent accused the petitioner of committing acts of criminal libel. *Garrison* v. *State of Louisiana,* 379 U. S. 64; *Wilcox* v. *Royal Arcanum,* 210 N. Y. 370, 104 N. E. 2d 624. As stated by the New York Court of Appeals in *Wilcox, supra,*

> "It is as though a judge defamed were to try the defamer for a criminal libel." (210 N. Y. at 379)
>
> "It is shocking to one's sense of fair play that persons defamed should be selected to try the defamatory charge, and it is sufficient for the purposes of this case to hold that they are disqualified by a direct interest in the subject-matter of the controversy." (210 N. Y. at 380)

It is to no avail that the respondent ultimately dropped its criminal libel charge, after apparently having realized its disastrous error, and thereafter went through the motions of conducting much of the proceeding with superficial "meticulous fairness", for once this charge was included, all subsequent proceedings were jurisdictionally void. *Wilcox* v. *Royal Arcanum,* 210 N. Y. 370, 104 N. E. 2d 464; *In re Thoms' Trust,* 24 A.D. 2d 536, 261 N. Y. S. 2d 304 (4th Dept.).

As stated in Corpus Juris Secundum, "A judge who is disqualified in a cause does not become qualified by the mere removal from the record of the reasons for his disqualification." 48 C. J. S., Judges, §81, page 1056.

The Florida Supreme Court well expressed the principle in *Kells* v. *Davidson,* 102 Fla. 684, 136 So. 450, 451, in stating:

> "It would be an unwise provision of law which would contemplate that, when a judge is once disqualified in a cause, the reason for his disqualification could be removed from the record, and thereupon such judge would become qualified and proceed with the disposition of the cause and act as though he had never been disqualified.
>
> * * *
>
> The safe and sound rule is that, when the record once shows that a judge is disqualified in a cause, it becomes his duty to certify such disqualification, transfer the cause to some other qualified judge, and thereafter take no part in the disposition of the cause." See also *Stringer* v. *United States,* 233 F. 2d 947 (C. A. 9); *Hall* v. *Superior Court of Imperial County,* 198 Cal. 373, 245 Pac. 814, 819.

The present case is totally unlike cases such as *In re MacNeil,* 266 F. 2d 167 (C. A. 1), inappropriately relied upon by Judge Bartels in *Sarisohn* v. *Appellate Division,* 265 F. Supp. 455 (E. D. N. Y.), where the subject of disbarment proceedings intentionally commenced a law suit wherein he joined every judge as a class with the design of unilaterally disqualifying the entire judiciary.

In the present case, the petitioner was confronted with the ignominy of being relieved of his duties for a period of two weeks before the respondent preferred any charges against him. It was natural for him to be critical of being placed in such a helpless circumstance, subject to the public humiliation of having been suspended from office for then unstated reasons, with no opportunity to

defend his reputation. Whatever comments he made in his defense were without knowledge as to whether formal charges would be preferred, and whether he would be required to defend against such charges at a hearing before some then unknown tribunal.

If the respondent wished to seek to punish the petitioner for his alleged commission of criminal libel, because he was critical of his accuser, many other forums were available. However, once having joined such charges as an integral part of its removal proceeding, the respondent, out of every sense of fundamental fairness to its target, could no longer justify its continuance in the proceeding.

The petitioner has always stood ready to be tried by any tribunal other than the one which had charged him of committing acts of criminal libel against it. He has repeatedly requested, at every stage of the proceedings, that the matter be transferred to another department of the Appellate Division, clearing any possible obstacle to such transference by expressly waiving his state constitutional right to have the department of his residence try him. (Appellant's Reply Brief before Court of Appeals, p. 5)

There was no necessity for the judges who comprised the respondent court, at the time of the alleged commission of the criminal libel, to sit in judgment. The matter could have been transferred to another department, sent to the Senate of the State (N.Y. Const. Art. 6, Sec. 23 (b)), or the respondent simply could have requested the governor to make temporary designations "from all the justices elected to the Supreme Court" (N.Y. Const. Art. 6, Sec. 4c) in order to provide for the "inability to act of any justice in such appellate division for service only during such inability to act." (N.Y. Const., Art. 6, Sec.

4d) Even if no other tribunal were available, the respondent still could not sit in judgment since, as stated by Judge Lehman in *Sharkey* v. *Thurston*, 268 N.Y. 123, 126, 196 N.E. 2d 766, "Necessity, whether actual or assumed, can never be a valid ground for depriving any person of a right guaranteed by the Constitution, or impose upon any person the consequences of guilt upon which a fair hearing has not been accorded."

Not even after the Court of Appeals reversed and remanded the case to the respondent court with the instructions to dismiss the wiretap charge if no independent evidence could be produced, would the respondent disqualify itself. Here the trial court was corrected for deliberately allowing "concededly" illegal evidence to form the basis of its finding of guilt as to the most serious charge against the petitioner, and for placing the petitioner in the prejudicial position of being compelled to rely upon his privilege against self-incrimination in order to resist the prosecutor's illegal use of the wiretaps on cross-examination. As the Court of Appeals recognized, abstracting these elements took away "a substantial part of the basis upon which the Appellate Divisi n acted." (Appendix C, *infra*, p. 43a) Because these elements composed such a significant part of the respondent's decision and were of such a highly prejudicial character, the respondent court must be presumed, as a matter of fundamental constitutional significance, not to have been possessed of the proper detachment necessary to pass further judgment. *Cf. Haverhill Gazette Company* v. *Union Leader Corporation*, 333 F. 2d 798 (C.A. 1), certerorari denied 379 U.S. 931; *Halliday* v. *United States*, 380 F. 2d 270 (C.A. 1); *United States* v. *Bryan*, 393 F. 2d 90 (C.A. 2); see also *People* v. *Owens*, 22 N.Y. 2d 93, 97-98, 238 N.E. 2d 715. As stated in *Haverhill*, *supra*,

> "Where a trier of fact has been corrected for a number of serious errors there are bound to be

> strains on a second trial, conscious or unconscious, irrelevant to the issues, and hence disruptive." (333 F. 2d 798 at 808.)

2. The reach of the proceedings involved certain additional elements which further violated the constitutional concept of a "fair hearing." Thus, the Statement of Charges only called for the petitioner's removal from his current judicial office, and never advised him that other penalties would be imposed. It was gross error, therefore, to bar the petitioner for life from holding any future judicial office.

Because the respondent did not limit itself to its Statement of Charges, failing to put the petitioner on notice that a greater penalty than removal would be imposed, the petitioner was given no opportunity to be heard in respect to the exercise of the respondent's discretion to meet out such a life sentence. After petitioner learned that the sweep of the respondent's decision was much broader than the punishment called for in its Charges, he was denied any opportunity to call witnesses upon the remand in order to address himself to this newly declared punitive sanction. (Appendix B, *infra,* pp. 8a, 13a)

The conduct of the respondent was so shocking in this respect that one of its own prosecuting counsel, apparently no longer capable of being a silent party to such misuse of power, was commendably compelled by conscience to beseech the respondent to control the lash of its decision:

> "As I understand it, based upon the order of August 12, 1966, this is an application to remove Judge Sarisohn. There is nothing in the order, nor in either Statement of Charges, alleging, directly or indirectly, that Judge Sarisohn should be barred from holding public office." (Brief of Reginald C.

Smith in Support of Application to Remove Respondent from the Office of District Court Judge in Suffolk County, S.A. 477.)

So too, the basis of the respondent's decision was not predicated on the theory that each charge on which he was found culpable, justified in itself the sanctions imposed, but rather that collectively they formed "a pattern which comes within the compass of 'cause'." (Appendix C, *infra,* p. 31a) The respondent never charged the petitioner with evincing a *pattern* of misconduct. If he had notice that the respondent intended to interweave a pattern of misconduct from the isolated incidences which formed the basis of the Statement of Charges, he would have submitted overwhelming proof that his conduct as a judicial officer had reflected a *pattern* of competency, integrity and professionalism.

The Court has recently expressed itself in *Matter of Ruffalo,* 390 U.S. 544, that the "absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges" deprives the subject of a disbarment proceeding of procedural due process. The principle has poignant application in the present case where the petitioner was not only refused a trial before an impartial and indifferent tribunal, but was further deprived of the opportunity of having a fair hearing by not being afforded notice of the "precise nature" of all of the charges and, as confessed by the respondent's own prosecuting counsel, further not being given fair notice as to the "reach" of the proceedings.

3. The petitioner urges that the Court should declare that the state's constitutional and statutory provisions regarding such removal proceedings do not establish proper standards and further, that they unconstitutionally sanction disciplinary action on the undefined and vague concept of "cause". The petitioner also submits that his constitutional rights have further been violated

by the fashion in which the respondent has applied these unconstitutional state provisions to him.

4. The petitioner submits that this case is of paramount importance. The treatment afforded the petitioner by the respondent leads to the growing suspicion amongst the bar that a judicial officer is not entitled to even the most minimal standards of procedural due process, and that all such constitutional rights must be discarded for the sake of the convenient, quiet administration of the courts. The respondent itself has added to this belief by recently recognizing that it will apply such minimal standards in removal proceedings involving any other type of public officer or public servant where, in recently reversing the dismissal of a prison guard, it held:

> "Although the record of the hearing does not reflect any bias or prejudice on the part of the hearing officer, petitioner was entitled to a hearing that was fair in all respects, to the exclusion of knowledge possessed by the trier of the facts; and the failure to grant him such a hearing deprived him of a right so fundamental and substantial as to invalidate the entire hearing." *Matter of Waters* v. *McGinnis,* 29 A.D. 2d 969, 970, 289 N.Y.S. 2d 376 (2nd Dept., April, 1968)

The petitioner asks if "Under our Constitution, the condition of being a boy does not justify a kangaroo court" (*Application of Gault,* 387 U.S. 1, 28), whether the condition of being a Judge does. The Court should speak on this issue lest its silence be construed as giving *carte blanche* to any tribunal which sits in judgment upon a beleaguered brethren to cast to the winds the procedural due process of law to which *all* are entitled.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

FREDERIC BLOCK,
Counsel for Petitioner

APPENDIX A

State Constitution and Statutory Provisions Involved

New York State Constitution, Article 6, Section 22, Subdivision i.

"A judge of the courts for the city of New York established pursuant to section fifteen of this article, of the district court or of a town, village or city court outside the city of New York may, in the manner provided by law, be removed for cause or retired for disability after due notice and hearing by the appellate division of the supreme court of the judicial department of his residence."

Uniform District Court Act, Section 103, Subdivision (e)

"The appellate division of the supreme court may remove a judge of the district court for cause or retire him for disability after due notice and hearing, under such procedures as may be established by law."

Code of Criminal Procedure, Section 132

"A judge of the courts for the city of New York established pursuant to section fifteen of article six of the constitution, of the district court or of a town, village or city court outside the city of New York may be removed for cause or retired for disability, as provided by the constitution, by the appellate division of the supreme court. The appellate division may in its discretion prohibit a judge or a justice so removed from holding public office, elective or appointive, thereafter. The appellate division shall have power to order the proofs upon any proceedings hereunder to be taken by a referee to be appointed by such appellate division and to certify the

reasonable expenses of such referee, which amount, so certified, is hereby declared to be a charge against the city, town or village within which such judge or justice exercises the duties of his office. Such court may also in its discretion require the person or persons instituting proceedings for the removal of either of the officials above named to give security, to be approved by such court, for the expenses incident to the hearing and determination thereof, in case the charges against such official are not sustained. The appellate division shall also have power on its own motion, or on petition, to investigate or cause to be investigated, the said inferior courts, and the judges or justices thereof, and to designate a justice of the supreme court or to appoint a referee to conduct such investigations, the reasonable expenses thereof to be certified and made a charge in the manner hereinbefore provided."

APPENDIX B

Portions of Record Showing Proper and Timely Raising of Federal Questions

Order on Motion for Reargument

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Ninth day of October A. D. 1968.

Present:

HON. STANLEY H. FULD,
Chief Judge, presiding.

---

2 Mo. No. 794

In the Matter of the Proceedings

—against—

Suffolk County District Court Judge
FLOYD SARISOHN,

Appellant,

THE APPELLATE DIVISION OF THE SUPREME COURT,
SECOND DEPARTMENT,

Respondent.

A motion for reargument or, in the alternative, to amend the remittitur in the above cause to this Court

having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks reargument, be and the same hereby is denied, and it is

ORDERED, that the said motion, insofar as it seeks amendment of the remittitur, be and the same hereby is granted. The return of the remittitur is requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there were presented and necessarily passed upon the following questions under the Constitution of the United States: (1) whether appellant was deprived of due process and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, and (2) whether subdivision i of section 22 of Article 6 of the Constitution of New York State, subdivision e of section 103 of the Uniform District Court Act of the State of New York, and section 132 of the Code of Criminal Procedure of the State of New York violated the Fourteenth Amendment to the Constitution of the United States. The Court of Appeals held that there was no violation of the Fourteenth Amendment to the Constitution of the United States.

AND the Appellate Division of the Supreme Court, Second Judicial Department, hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

GEARON KIMBALL
Deputy Clerk

Appendix B

Notice of Motion

[SAME TITLE]

SIR:

PLEASE TAKE NOTICE that upon the affidavit of Frederic Block, sworn to the 16th day of August, 1968, the Record on Appeal and the Appellant's Briefs before the Court of Appeals, and upon all the prior proceedings herein, the undersigned will move this Court on its next motion day, at Court of Appeals Hall, Albany, New York, at 2:00 P.M. of that day or as soon thereafter as counsel can be heard, for the following relief:

I. To permit reargument of the appeal herein for the purpose of a reconsideration and redetermination by this Court of its decision of June 13, 1968, which affirmed the order of the Appellate Division, Second Department, dated December 27, 1967, removing the Appellant from office as a Judge of the District Court of Suffolk County and prohibiting him from holding any future judicial office, appointive or elective.

II. In the event that the above motion for reargument be denied, to order the recall and amendment of the remittitur to certify:

(a) That the Court of Appeals has held against the Appellant as to the following federal constitutional issues, which the Appellant has duly raised and presented to this Court.

(1) The involvement of the Respondent, Appellate Division, Second Department, in every role and phase

of the proceedings, especially when coupled with its self-acclaimed status as an aggrieved party, prevented the Appellant from securing a fair trial in violation of the Appellant's rights under the Due Process Clause and Equal Protection Clause of the 14th Amendment of the United States Constitution.

(2) The failure of the Respondent to give the Appellant notice and a hearing as to certain items which the Respondent found warranted the Appellant's removal violated the Appellant's rights under the Due Process Clause and Equal Protection Clause of the 14th Amendment of the United States Constitution.

(3) The removal of the Appellant on the basis of past acts occurring before he was elected as District Court Judge violated the Appellant's rights under the Due Process Clause and Equal Protection Clause of the 14th Amendment of the United States Constitution.

(4) The unequal treatment of the Appellant by the Respondent, Appellate Division, Second Department, in its finding "cause" for his removal as to matters which the courts have consistently held do not warrant removal from judicial office, violated the Appellant's rights under the Due Process Clause and Equal Protection Clause of the 14th Amendment.

(5) The failure of the Respondent to disqualify itself upon the remand from the Court of Appeals' decision of December 7, 1967, because a bias existed as a matter of law as a consequence of the Justices comprising the Respondent Court having priorly sat in judgment in the same proceeding and further because illegal evidence formed a substantial part of the Respondent's prior de-

cision and was of such a highly prejudicial character as to preclude the proper detachment necessary to pass further judgment upon the Appellant, violated Appellant's rights under the Due Process Clause and Equal Protection Clause of the 14th Amendment of the United States Constitution.

(b) That the Court of Appeals rejected the Appellant's challenge under the Due Process Clause and Equal Protection Clause of the 14th Amendment of the United States Constitution, to Article 6, Section 22, subdivision i, of the New York State Constitution, Section 103, subdivision e, of the Uniform District Court Act of the State of New York and Section 132 of the Code of Criminal Procedure, and that the constitutionality of said State constitutional and statutory provisions was upheld by this Court.

III. To grant such other and different relief as this Court may consider just and proper.

TAKE FURTHER NOTICE, that answering affidavits, if any, shall be served no later than five (5) days prior to return date of this motion.

Yours, etc.

FREDERIC BLOCK
Attorney for Appellant
Office & P.O. Address
1919 Middle Country Road
Centereach, New York, 11720

To: SOLOMON A. KLEIN, Esq.
Attorney for Respondent
Office & P.O. Address
16 Court Street
Brooklyn, New York, 11201

Appendix B

Affidavit of Frederic Block

STATE OF NEW YORK }
COUNTY OF SUFFOLK } SS.:

FREDERIC BLOCK, being duly sworn, deposes and says:

1. I am the Appellant's attorney and, as such, I am fully conversant with every facet of the subject proceedings.

2. This affidavit is submitted in support of the Motion herein for reargument, or in the alternative, requesting this Court to amend the remittitur to certify that the Court of Appeals rejected certain federal constitutional questions which the Appellant duly raised in this proceeding.

3. On May 15th, 1967, the Respondent, Appellate Division, Second Department, removed the Appellant from his office as District Court Judge and prohibited him from thereafter holding any judicial office, appointive or elective, (27 A.D. 2d 466).

4. Thereafter, the Appellant appealed to this Court as a matter of right, which appeal raised several substantial federal constitutional questions, as itemized at pages 56-57 of the Appellant's brief, a copy of these pages being annexed hereto.

5. On December 7, 1967, this Court found that the evidence in support of the second part of charge 1 was inadmissible because it consisted of intercepted telephone conversations based on eavesdropping orders not obtained in accordance with the requirement of state statute, and thereupon, remanded the matter to the Respondent with

instructions to dismiss the first charge unless other untainted evidence could be supplied to support it and, if the charge be dismissed, to reconsider the disposition to be made on the basis of the remaining charges (21 N.Y. 2d 36).

6. On the remand, the Respondent dismissed the first charge and stated that it disregarded the claim of privilege which arose solely in connection with that charge. Nonetheless, on December 27, 1967, the Respondent reinstituted the same punishment, *nunc pro tunc,* which it originally established in its decision of May 15, 1967.

7. At the time of the remand, the Appellant raised six motions, a copy of which is annexed hereto. Items 1, 2, and 3 raised new issues necessarily brought about as a result of the Court of Appeals reversal and remand. Items 4, 5 and 6 were essentially renewals of all prior motions and constitutional issues which had been presented to this Court on the appeal. The Respondent granted motion number 1, denied 2, 3, 4 and 5, and adhered to its previous determinations with respect to the omnibus motion number 6.

8. Thereafter, the Appellant once again appealed to the Court of Appeals, renewing all the federal constitutional issues which had previously been raised in the prior appeal, while supplementing the appeal with additional federal constitutional issues brought about as a result of the refusal of the Respondent to disqualify itself upon the remand.

9. On June 13, 1968, this Court unanimously affirmed the decision of the Respondent Appellate Division, Second Department of December 27, 1967.

Appendix B

10. Appellant, with sedulous care, has duly raised the constitutional issues detailed in the Notice of Motion herein, having carefully preserved those constitutional issues raised on the first appeal, which appeal resulted in the non-final order of remand to the Respondent, Appellate Division, Second Department.

11. Appellant has, throughout, challenged the constitutionality of those, state, constitutional and statutory provisions which establish the standard of "cause" for removal and which prescribe, in part, the procedure for the implementation and conduct of a judicial removal proceeding of a District Court Judge (N.Y. Const. art. 6, §22, subd. i; U.D.C.A. §103, subd. 3; Code Crim. Proc. §132)

12. As for the other constitutional issues which were raised on the first appeal (and reasserted on the second appeal), this Court disposed of them against the Appellant in the following fashion: (21 N.Y. 2d at p. 48).

> "Appellant also argues that there is an absence of standards for removal; that the Court sat as charge-maker, prosecutor and trier of the facts; and that the court had previously demonstrated prejudice against appellant, for which it should not have tried the matter. These are contentions that go to the traditional nature of removal, proceedings and at this late date do not merit discussion."

13. Since the second appeal to this Court resulted in a unanimous decision, without opinion, it is assumed that the Court has adhered to its original disposition of such constitutional issues. It is also assumed that the Court's silence presumes a similar disposition as to the new con-

stitutional issues brought about as a result of the remand to the Appellate Division, Second Department, and raised in the second appeal to this Court, as shown by the Appellant's Notice of Appeal, served June 19th, 1968, a copy of which is annexed hereto.

14. Wherefore, it is respectfully submitted that the remittitur be amended to certify that this Court necessarily upheld the constitutionality of N.Y. State Const. Art. 6, §22, subd. i; U.D.C.A. §103, subd. 3; Code Crim. Pro. §132, and further held against the Appellant on the other federal constitutional questions itemized in this Notice of Motion, which the Appellant duly raised and presented to this Court.

/s/ FREDERIC BLOCK

(Sworn to August 16, 1968.)

Appendix B

Notice of Appeal

SUPREME COURT: STATE OF NEW YORK

APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT

In the Matter of Proceedings against SUFFOLK COUNTY DISTRICT COURT JUDGE FLOYD SARISOHN,

Respondent-Appellant.

SIRS:

PLEASE TAKE NOTICE that the above-named respondent hereby appeals as of right pursuant to Section 5601(b)(1) of the Civil Practice Law and Rules, Article 6, Section 3(b)(1) of the Constitution of the State of New York, and all other applicable provisions of law, to the Court of Appeals of the State of New York from the final order herein entered in the office of the Clerk of the Appellate Division on the 27th day of December, 1967, and filed pursuant to section 35 of the Public Officers Law of the State of New York with the Clerk of the County of Suffolk, State of New York, on January 12, 1968, ordering the removal of the respondent from his public office as a District Court Judge of Suffolk County, New York, and prohibiting the respondent from holding judicial office, appointive or elective, hereafter, and

PLEASE TAKE FURTHER NOTICE that the respondent further appeals from all other orders or decisions which may be deemed merged into said final order, and

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PLEASE TAKE FUETHER NOTICE that this appeal directly involves the construction of the Constitution of the State of New York and of the United States of America as follows, but nothing contained herein shall be deemed a waiver of the respondent's right to assert any and all other Constitutional rights or issues involved herein or any other issues of law or fact which may be appropriate for review by the Court of Appeals.

1. The nature and conduct of the proceedings of the Appellate Division on the remand in addition to the original proceedings, its refusal to disqualify itself as a party in interest on the remand and in the original proceedings, as well as for reasons of bias and prejudice, was violative of the respondent's state and federal constitutional rights.

2. The removal of the respondent appellant was based upon charges and facts of which he was not given due notice and an opportunity to defend against, in violation of his state and federal constitutional rights.

3. The denial by the Appellate Division, Second Department of the State of New York of respondent-appellant's application on December 20, 1967 for a new hearing and the right to call additional witnesses violated respondent-appellant's state and federal constitutional rights of due process.

4. The decision of the Appellate Division, Second Department of the State of New York, to remove respondent-appellant from his position as a District Court Judge of the County of Suffolk, State of New York, and to prohibit him from holding any elective or appointive judicial office for life, was an abuse of its discretion; violative of the letter and spirit of the decision of the Court

of Appeals of the State of New York decision dated December 7, 1967; in excess of the Appellate Division authority; and violated respondent-appellant's state and federal constitutional rights.

5. The order of the Appellate Division, Second Department of the State of New York, dated December 27, 1967, made "nunc pro tunc as of May 15, 1967" was without a authority in law and violated respondent-appellant's state and federal constitutional rights.

6. Article 6, Section 22, subdivision 1, which forms the basis of jurisdiction for the removal proceedings herein, is so vague, indefinite and uncertain in its application as to be violative of the constitution of the United States of America.

7. The respondent's right under the due process clause and equal protection clause of the Constitution of the United States of America was violated.

PLEASE TAKE FURTHER NOTICE that this appeal is from each and every part of said order and the whole thereof, and

PLEASE TAKE FURTHER NOTICE that upon service of this notice of appeal the order appealed from herein is hereby stayed pursuant to Section 5519(a)(1) of the Civil Practice Law and Rules of the State of New York on the grounds that the respondent is an officer of the State of New York or a political subdivision of the State.

Yours, etc.,

FLOYD SABISOHN, Esq.
Per se
8 Walter Court
Commack, New York 11725

Appendix B

To: Clerk of the Supreme Court
Appellate Division, Second Judicial Department
45 Monroe Place
Brooklyn, New York

Solomon Klein, Esq.
Attorney for Appellate Division
Second Judicial Department
The Office of Judicial Inquiry
16 Court Street
Brooklyn, New York

Recapitulation of Federal Constitutional Issues Raised

The following Federal Constitutional issues have been raised herein:

(1) The use of wiretap evidence against the appellant violated the 4th and 5th Amendments. (Point II)

(2) The removal of the appellant from public office because he invoked his privilege against self-incrimination violated the 5th Amendment. (Point III)

(3) The involvement of the Appellate Division in every role and phase of the proceeding, especially when coupled with its self-acclaimed status as an aggrieved party, prevented the appellant from securing a fair trial in contravention to the Due Process Clause and Equal Protection Clause of the 14th Amendment. (Point IV)

(4) The removal of the appellant on the basis of past acts violated his rights under the Due Process Clause and

Appendix B

Equal Protection Clause of the 14th Amendment. (Point V)

(5) The removal of the appellant "for cause" under the prescribed State Constitutional and Statutory provisions, was in violation of his rights under the Due Process Clause and Equal Protection Clause of the 14th Amendment because such standard is vague and uncertain. (Point VI)

(6) The unequal treatment of the appellant by the Appellate Division in its finding "cause" for his removal as to matters which the courts have consistently held do not warrant removal from judicial office, violated the appellant's rights under the Due Process Clause and Equal Protection Clause of the 14th Amendment. (Point VI)

(7) The failure of the Appellate Division to give the appellant notice and a hearing as to certain items which the Court found warranted the appellant's removal, denied him his rights under the Due Process Clause and Equal Protection Clause of the 14th Amendment. (Point VII)

As justice Botein so aptly stated in his concurring opinion in *Matter of Osterman, supra,* 13 N.Y. 2d "a", "q":

> "I need not dilate upon how critical the judicial arm of our great governing triumvirate might be weakened if Judges, of all persons, were deprived of the pattern of protection afforded by the due process, privileges and immunity clauses of the Federal Constitution, and which are so reassuring and fortifying to other citizens."

Appendix B

Notice of Motion

SUPREME COURT: STATE OF NEW YORK

APPELLATE DIVISION: SECOND DEPARTMENT

In the Matter of the Proceedings Against
SUFFOLK COUNTY DISTRICT COURT JUDGE FLOYD SARISOHN,

Respondent

—against—

THE APPELLATE DIVISION OF THE SUPREME COURT,
SECOND DEPARTMENT.

SIR:

PLEASE TAKE NOTICE that upon the Decision of the Court of Appeals of the State of New York dated December 7th, 1967 and the Remittitur of the Appellate Division, Second Department for further proceedings in accordance with the Opinion of the said Court of Appeals, and upon all prior pleadings and proceedings heretofore had herein, the undersigned will move this Court at a Special Session thereof to be held at the Court House, 45 Monroe Place, Brooklyn, New York on December 20th, 1967 at 2:00 o'clock in the afternoon, for the following relief:

1. That the first charge be dismissed in its entirety since the evidence upon which it is predicated has been declared by the Court of Appeals to be illegal and upon the further ground that the attorney for the Appellate Division, Solomon A. Klein, Esq., has advised the Court that no other evidence can be supplied to support the first charge.

Appendix B

2. The Court should declare itself to be without jurisdiction for the purpose of the remand from the Court of Appeals since it was originally constituted as a court comprising of five Justices of which there remain but four.

3. The Court should disqualify itself because an implied bias exists, as a matter of law, and violation of the respondent's state and federal constitutional rights, as a consequence of the Justices comprising the Court having priorly sat in judgment in the same proceeding and upon the further ground that the illegal evidence formed a substantial part of the Court's prior decision and is of such a highly prejudiical character as to preclude, as a matter of law, the proper detachment which is necessary to now pass further judgment upon the respondent herein.

4. The Court should disqualify itself as a matter of fundamental fairness for the reasons stated in Item "3" above and as a further consequence of the ubiquitousness of it's posture in every stage of the proceedings herein, in violation of the respondent's state and federal constitutional rights.

5. That the respondent be given a hearing, including the right to call witnesses in his behalf, on the remaining charges.

6. The respondent renews each and every motion heretofore made herein with equal force and effect as if specifically now set forth.

Yours, etc.

FREDERIC BLOCK
Attorney for Repsondent
Office & P.O. Address
1919 Middle County Road
Centereach, New York

Appendix B

To: SOLOMON A. KLEIN
Attorney for Appellate Division
Second Department
16 Court Street
Brooklyn, New York

CLERK OF THE APPELLATE DIVISION
SECOND DEPARTMENT
45 Monroe Place
Brooklyn, New York

APPENDIX C

Opinions of Lower Courts

SUPREME COURT

APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT.

CHRIST, Acting P.J., BRENNAN, RABIN, HOPKINS and BENJAMIN, JJ.

In the Matter of Proceedings Against

Suffolk County District Court Judge
FLOYD SARISOHN,

Respondent.

In a proceeding to remove respondent from office for cause, motion by respondent to strike and dismiss certain of the allegations of the statement of charges.

FLOYD SARISOHN, of Commack, New York (ARTHUR GOLDSTEIN, of counsel), respondent in person.

REGINALD C. SMITH, of Riverhead, New York, counsel appointed to conduct the proceeding.

PER CURIAM:

This is a proceeding pursuant to article 6, section 22, subdivision i of the Constitution, section 103, subdivision (e) of the Uniform District Court Act and section 132 of the Code of Criminal Procedure to remove respondent,

a Judge of the District Court of Suffolk County, from office for cause. The respondent moves to strike and dismiss paragraphs First, Ninth and portions of paragraph Sixth of the original Statement of Charges, and paragraph Eighteenth of the supplemental Statement of Charges, on the grounds (a) that the allegations therein contained pertain to acts which occurred prior to January 1, 1964, when respondent became a Judge of the District Court of Suffolk County, and (b) that the acts are not related to respondent's conduct as a District Court Judge.

Under the applicable provisions of the Constitution and relevant statutes, (N.Y. Const. art. 6, §22, subd. i; UDCA §103, subd. (e); Code of Criminal Procedure §132) a Judge of the District Court may be removed "for cause" by the Appellate Division of the Supreme Court. While the Constitution and the statutes enacted thereunder do not prescribe what constitutes the "cause" which justifies a removal, the cases have defined it as acts "including corruption, general neglect of duty, *delinquency affecting general character and fitness for office,* acts violative of law inspired by interest, oppressive and arbitrary conduct, reckless disregard of litigant's rights, and acts justifying 'the finding that his future retention of office is inconsistent with the fair and proper administration of office'" (*Matter of Kane* v. *Rudich,* 256 App. Div. 586, 587).

Unlike the Public Officers Law (§§ 32, 36) which provides for removal for misconduct, maladministration, malfeasance or malversation *in office,* there is no comparable constitutional or statutory provision which requires that the "cause" for removal under article 6, section 22, subdivision i of the Constitution, section 103, subdivision (e) of the Uniform District Court Act and section 132 of the Code of Criminal Procedure must relate to misconduct in office, or that the wrongdoing must relate to the official

duties of the judicial officer, or that it shall have occurred during the particular term which the officer was serving when the proceedings were instituted. The absence of any such limitation in the text of either section 22 of article 6 of the Constitution or the relevant statutory provisions leads us to the conclusion that the removing body may consider any acts of misconduct which reflect adversely upon the general character and moral fitness necessary to the proper performance of the duties of judicial office. "'Cause' is an inclusive, not a narrowly limited, term. Such 'cause' may be directly associated with the Judge's work as a Judge but it is not limited to such matters" (*Matter of Osterman,* 13 N Y 2d [a]).

In our opinion, the term "for cause" includes any misconduct, even if committed prior to the taking of judicial office, as would disclose that the Judge's retention in office is inconsistent with the fair, proper and wholesome administration of justice. A judicial officer is nonetheless unfit to hold office and the interests of the public are nonetheless injuriously affected even though the misdeeds which portray his unfitness occurred prior to assuming such office (cf. *Matter of Newman* v. *Strobel,* 236 App. Div. 371). This principle is particularly applicable where, as here, the acts alleged to have been committed by respondent occurred while he held prior judicial office as a Justice of the Peace of the Town of Smithtown. We, therefore, reject respondent's contention, implicit in the motion before us, that a judicial officer may not be removed for any act of misconduct which occurred prior to the commencement of his term of office.

For the purpose of this motion to dismiss, the charges against respondent must be deemed to be true. We hold that by their nature, as alleged, they would constitute sufficient ground for removal "for cause", if established.

Appendix C

Even under the restricted and restrictive provisions relating to the removal of town and certain local officers under section 36 of the Public Officers Law, misconduct in office during a preceding term is sufficient cause for removal (*Matter of Corwin* v. *Mercier,* 14 A D 2d 652; *Matter of Newman* v. *Strobel, supra*). Holding, as we do, that misconduct involving moral turpitude constitutes "cause" for removal whether it took place before or after the assumption of judicial office presently held, all the more is that true where, as here, the alleged misconduct was committed during a term of judicial office immediately preceding the present office.

An additional and independent ground for denying the motion flows from the basic principle that since a District Court Judge is required by law to be an attorney (N. Y. Const. art. 6, §20, subd. a), any act which reflects adversely on his character and fitness to be an attorney necessarily reflects upon his character and fitness to remain in judicial office.

Finally, we find to be without merit the contention that since the respondent was, by the vote of his constituents, deemed capable and worthy to serve as a District Court Judge, this Court does not have the power to nullify the selection of the people on the basis of a character review of his moral or ethical conduct before he assumed that office. This precise argument was presented and rejected by the Court in the *Strobel* case, *supra,* for reasons with which we are in full accord. At bar, as it appears that the alleged misdeeds of respondent were not known to the voters when they elected him to his present office, the claim that respondent's election closes the door to an inquiry concerning his alleged past misconduct is without substance.

The motion is denied, without costs.

CHRIST, Acting P. J., BRENNAN, RABIN, HOPKINS and BENJAMIN, JJ., concur.

Appendix C

SUPREME COURT, APPELLATE DIVISION
SECOND JUDICIAL DEPARTMENT

Ughetta, Acting P.J., Brennan, Rabin, Hopkins and Benjamin, JJ.

[SAME TITLE]

Proceeding to remove respondent from office.

Harry C. Brenner (Arthur Goldstein, of counsel) for respondent.

Reginald C. Smith and Solomon A. Klein, counsel appointed to conduct and try the proceeding.

PER CURIAM:

Having determined preliminarily from reports transmitted to its Director of Administration of the Courts by the Administrative Judge of Suffolk County that sufficient reason existed therefor, this Court ordered an investigation to be made concerning the conduct of respondent. Therafter this proceeding was instituted pursuant to the applicable provisions of the Constitution and relevant statutes (N.Y. Const., art. 6, § 22, subd. i; UDCA, §103, subd. e; Code Crim. Pro., § 132) to remove respondent, a Judge of the District Court of Suffolk County, from office for cause.

In December 1954 respondent was admitted to the Bar. Between January 1, 1960 and Deecmber 31, 1963 he was a duly elected Justice of the Peace of the Town of Smithtown. Beginning January 1, 1964 he was a duly elected Judge of the District Court of Suffolk County.

The original and supplemental statements contain 18 charges against respondent. By order, dated February 8,

1967, nine of the 18 charges were struck out and deleted from consideration in this proceeding.

Of the nine remaining charges, charges 1, 9 and 18 have to do with respondent's conduct while he was a Justice of the Peace and prior to his taking office as a District Court Judge. On November 28, 1966 this court denied respondent's motion to strike these charges, the motion having been made on the ground that the charges related to acts prior to respondent's taking office as a Judge of the District Court, and were unrelated to respondent's conduct as such Judge (26 A D 2d 388). On December 9, 1966 this court denied leave to appeal to the Court of Appeals from the said order, and on February 21, 1967 the Court of Appeals likewise denied leave to appeal (19 N Y 2d 689).

Charge 1 relates to respondent's relationship with one Carmen Sanabria, also known as Elida Peck and as Lee Matos. On July 18, 1962 Mrs. Sanabria had pleaded guilty before Justice of the Peace Kane, sitting as a Court of Special Sessions in Suffolk County, to having committed prostitution at the Sunshine Valley Motel in Huntington. On October 24, 1962 she was sentenced to a term of three months, with execution of sentence suspended, and she was placed on probation for three years.

Charge 1 is in two parts. In the first part respondent is charged with having solicited legal business about July 23, 1962 in that he urged Mrs. Sanabria to engage his services, stating that he was a Judge in Smithtown, that he knew Judge Kane, and could be of great assistance to her. In the second part respondent is charged with advising Mrs. Sanabria during August and September 1962 (after she had pleaded guilty to prostitution and while awaiting sentence) to mislead the Probation Department by falsely pretending to have desisted from prostitution

and advising where and how she should carry on her activities as a prostitute, without getting caught again; and respondent assured her she would receive a suspended sentence if, in the interim, she followed his instructions.

The evidence against respondent consists of recorded telephone conversations between respondent and Mrs. Sanabria obtained as the result of separate orders made on July 2, 1962, August 31, 1962, and June 4, 1963, pursuant to section 813-a of the Code of Criminal Procedure, authorizing the tapping of Mrs. Sanabria's telephone. The recorded conversations took place on July 23 and 24; August 10-13; August 16-20; August 29; September 14—all 1962; and June 19-21, 1963. At the opening of the hearing respondent moved to vacate the three wiretap orders and to suppress the evidence obtained as a result of the telephonic interception.

Respondent's motion is denied. Evidence obtained by a wiretap order lawfully issued is admissible (People v. Dinan, 11 N Y 2d 350, cert. den. 371 U. S. 877; People v. Berger, 18 N Y 2d 638). The evidence established that there was before the Judges who made the three orders sufficient factual proof of the existence of reasonable grounds for the granting of the applications, which proof was given orally on oath to the Judges. The contents of the tapes establish conclusively that the conversations were held between Mrs. Sanabria and respondent.

In our opinion, the evidence is insufficient to sustain the first part of charge 1. The evidence does not show that respondent was seeking to become Mrs. Sanabria's attorney. However, the evidence is sufficient to sustain the second part of charge 1. We find that respondent was guilty of obstruction of justice in that he improperly advised a prostitute in the further conduct of her occupation and im-

properly assisted, prior to the imposition of sentence by Judge Kane, to secure a suspended sentence for her.

In charge 18 it is alleged that on October 18, 1962 respondent, while the attorney for the said Mrs. Sanabria, gave bail for the said defendant in violation of section 554-b of the Code of Criminal Procedure. In our opinion, the evidence is insufficient to sustain this charge and it is dismissed.

With respect to charges 1 and 18 respondent refused to testify on the grounds that (a) his conversations with Mrs. Sanabria represented a privileged communication between attorney and client; and (b) the answers might tend to degrade and incriminate him. In our opinion, neither ground is valid. Respondent expressly disclaimed any attorney-client relationship with Mrs. Sanabria with respect to the prostitution charge. We are further of the opinion that respondent's invocation of the constitutional privilege against self-incrimination when asked questions specifically, directly, and narrowly relating to the performance of his official duties as a Justice of the Peace, which judicial office was abolished on December 31, 1963 and was succeeded by the office of District Court Judge on January 1, 1964, is in itself sufficient cause for removal of a Judge. (Spevack v. Klein, —— U. S. ——, 87 S. Ct. 625, ——.) Despite his rights as a citizen to refuse to answer possibly incriminating questions, a public officer may be removed from office for refusing to cooperate by producing relevant information and for refusing to answer questions based upon alleged constitutional privilege, in an inquiry as to his fitness to hold his office. "Cause" for removal of a Judge may be found not only in official misconduct, but in his taking attitudes and positions which show unfitness for the office and unworthiness of the trust. Such unfitness and unworthiness is demonstrated by the refusal of

a Judge sworn to enforce law to cooperate in any investigation of his acts. (Matter of Osterman, 13 N Y 2d (a) (1).)

Charge 9 is that on September 19, 1962 respondent caused his docket to be altered in a summary proceeding before him as a Justice of the Peace.

In a summary proceeding entitled Lukon v. Sedley and Sunrise Industrial Terminal, Inc., instituted on February 5, 1962 to recover arrears of rent of $15,000 (which the landlord's attorney testified was actually in excess of $20,000), there were a number of adjournments; the matter was then put over until September 19, 1962. On that day the landlord appeared, but the tenant did not. Respondent directed the entry of a default judgment. After the clerk of the court entered the default judgment, the attorney for the tenant telephoned to respondent that he had not been advised that the case would be on for trial on September 19, 1962. Without requiring a motion to be served to vacate the default, respondent directed that the entry of the default judgment be eliminated and the case be restored to the trial calendar for October 16, 1962. Respondent's docket book shows that the entire docket page, including the entry of the default judgment, was completely erased with ink eradicator. At the hearing respondent testified that he did not direct anyone to eradicate the page with ink eradicator. However, in an Article 78 proceeding instituted by the landlord shortly after the default judgment was opened, respondent submitted an affidavit in which he stated that he directed the court clerk to remove the entry of the default judgment; he subsequently learned that the clerk followed his instructions and eliminated the erroneous entry in the docket pursuant to his instructions; and that he had ordered the erasures. Thus, respondent's testimony at the hearing before

this court is inconsistent with his affidavit, sworn to December 18, 1962, shortly after the incident occurred. In our opinion, it was improper for respondent to have vacated the default judgment ex parte, without notice to opposing counsel, and it was wrongful conduct to have knowingly caused the entry of the default judgment to be physically eradicated from the official court docket.

The remaining charges are with respect to respondent's conduct as a District Court Judge.

Charge 2 is with respect to an action entitled Joy v. McClean for $107 property damage to plaintiff's automobile struck by an automobile operated by an unknown driver, which automobile had emerged from defendant's driveway. The charge is that, when defendant refused to tell respondent the name of the driver of the automobile, he ordered her to be placed in custody and confined in a cell; when she consented to make payment of $87.50 in settlement of plaintiff's claim, respondent had her released from custody.

In our opinion, the evidence clearly shows that respondent told this unsworn defendant, prior to the trial of this negligence action, that he was placing her in the custody of the court attendant and that he was going to arraign her before him, sitting as a Court of Special Sessions, on a charge of obstructing justice because she would not reveal the name of the owner of the automobile which had allegedly caused the damage. Although the trial had not started and defendant had not been placed under oath, respondent also threatened her with contempt for failure to reveal the name of the owner of the automobile and ordered the court attendant to take her into custody. She was thereupon placed in a cell by the court attendant until she was released by order of the court clerk. We find respondent guilty of this charge.

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Charge 4 is that on January 21, 1966 respondent held one Frank Dohmen, charged with burglary in the third degree and two counts of assault in the second degree, in bail of $500,000 on each count, which bail was obviously excessive. While fixation of bail in this unusually high amount was error which merits severe criticism, standing alone, we would not deem it cause for removal.

Charge 7 is that on March 22, 1966 one Topol was given a summons for speeding, returnable in Babylon on April 28, 1966; respondent was advised on April 4, 1966 by the President Judge of the District Court not to interfere with the case; nevertheless, on May 12, 1966, when respondent was assigned to hold court in Bay Shore, he entered the courthouse in Babylon, obtained possession of the "back-up" sheet, endorsed thereon that Topol had been arraigned before him on that day (May 12, 1966), had pleaded guilty, and that he had imposed a fine of $10 and suspended sentence. The evidence is amply sufficient to sustain the charge of improper handling of this traffic summons despite the express direction of the President Judge not to assume jurisdiction in a matter not properly before him. We find him guilty of this charge.

Charge 8 is that, although a District Judge had on July 29, 1966 fixed bail for three defendants on disorderly conduct charges, respondent on July 30, 1966 ordered the release of defendants without bail without communicating with the Judge who had fixed bail or with the Judge assigned to preside at the part hearing bail reduction applications or with the District Attorney. Without detailing the evidence in connection with this charge, suffice it to say that, under the special circumstances here present, we find no evidence of wrongdoing.

Charge 10 is that on November 12, 1964 respondent was intemperate and abusive in his statements to attor-

ney Heil, trial counsel for Patrick Adams, attorney for defendant. Charge 12 is that on March 31, 1965, in connection with another case in which Patrick Adams was attorney of record for defendant, respondent was intemperate and partial. In both cases the attorneys representing defendant moved that respondent disqualify himself; the motions were denied. The evidence is clear that respondent was prejudiced against the attorney of record for defendant in each of these cases and that he showed a pattern of unjudicial conduct on both occasions.

While the Constitution and the statutes enacted thereunder do not prescribe what constitutes "cause" sufficient to justify removal, the cases have defined it as acts "including corruption, general neglect of duty, delinquency affecting general character and fitness for office, acts violative of law inspired by interest, oppressive and arbitrary conduct, reckless disregard of litigant's rights, and acts justifying 'the finding that his future retention of office is inconsistent with the fair and proper administration of office' " (Matter of Kane v. Rudich, 256 App. Div. 586).

In our opinion, respondent's guilt of the second part of charge 1 and of charges 2, 7, 9, 10 and 12, and his invocation on this hearing of his constitutional privilege against self-incrimination, show a pattern which comes within the compass of "cause" as thus defined, and make it imperative that respondent no longer be permitted to pass judgment on the rights of litigants.

Section 132 of the Code of Criminal Procedure provides that, in addition to removal from office, this Court may in its discretion prohibit a Judge so removed from holding public office, elective or appointive, thereafter. Although the statute gives this Court the power to prohibit respondent from holding any public office in the

future, it is our opinion that the greater includes the lesser, and that the power to prohibit him from holding any public office includes within it the power, in the exercise of discretion, to prohibit respondent from holding future judicial office. It is our view that the seriousness of his guilt upon the charges sustained and his taking refuge on this inquiry in the constitutional privilege against self-incrimination mandates that he be prohibited from holding judicial office, elective or appointive, hereafter.

Respondent is removed from his office as a District Court Judge and is prohibited from holding judicial office, appointive or elective, hereafter.

Appendix C

Opinion

STATE OF NEW YORK COURT OF APPEALS

No. 422. 67

In the Matter of

the Proceedings against Suffolk County District Judge,

FLOYD SARISOHN,

Appellant,

THE APPELLATE DIVISION OF THE SUPREME COURT,
SECOND DEPARTMENT,

Respondent.

BREITEL, J.:

Floyd Sarisohn, elected as a Suffolk County District Judge for a term commencing January 1, 1964, appeals from an order of the Appellate Division, Second Department, entered May 15, 1967. That court, pursuant to section 132 of the Code of Criminal Procedure, removed him from office and prohibited him from thereafter holding any judicial office, appointive or elective (27 A D 2d 466, *Per Curiam*).

The removal followed a series of intermediate motions, appellate applications to this Court, and a full hearing before the Appellate Division. Some, and one of the more serious, of the charges sustained involved conduct by Judge Sarisohn before he was elected to the District Court and while he was serving as a town Justice of the Peace. The Appellate Division, after conducting the proceedings with meticulous fairness, dismissed a number of other charges and in view of the dismissal there will be no occasion to discuss them.

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Appellant appeals as of right, and a preliminary question is whether an appeal lies. In *Matter of Droege,* 197 N.Y. 44, 48-50, a like proceeding affecting a New York City magistrate, it was held that an appeal would not lie on the ground that a removal proceeding was not a special proceeding within the statutes then regulating appeals to this Court. Since then, however, the practice statutes have been broadened with the expressed purpose of embracing within an "action or special proceeding" any civil judicial proceeding (CPLR 103[b], 105[d]; 1 Weinstein-Korn-Miller, N.Y. Civil Practice, ¶¶103.02-103.06, 105.05; cf. *Matter of Friedman,* 19 A D 2d 120, 122-124, app. dism. 375 U.S. 10, decided before CPLR was effective). The statute is sufficient to broaden the basis for appealability because the Constitution does not contain any restrictive definition of an action or special proceeding (Art. VI, §3). Moreover, there is some hypothetical basis for at least a threshold review in removal proceedings of this nature even when full reviewability is not available (*Matter of Droege, supra,* at p. 52; *Matter of Friedman, supra,* at pp. 122-123). Consequently, it is concluded that an appeal lies.

Of course, appealability does not mean that the reviewability of the issues is broad. On the contrary, the scope of review is narrow. As this Court observed in the *Droege* case (*supra*), the Appellate Division:

> ". . . is vested with the power of removal 'for cause.' Neither the Constitution nor the statutes have attempted to define what that 'cause' shall be. If this court should undertake to decide upon the sufficiency or insufficiency of a 'cause' passed upon by the Appellate Division in such a case it would be an assumption of power by this court, which the Constitution and the statutes have

granted exclusively to the Appellate Divisions." (at p. 51)

It also observed, however, that if the Court had power to review, its power would extend to seeing if there was "a real and substantial cause as distinguished from a futile or frivolous prosecution, and when once that question is decided in the affirmative it is the end of the appeal" (at p. 52). This is recognizable as roughly the equivalent to the substantial evidence rule in administrative law.

It is now appropriate to turn to the first of the charges sustained. This charge accused appellant of having advised and consulted with a prostitute on how she should conduct herself in a pending criminal prosecution against her in another court and how she could with impunity continue to practice her illicit trade. The events occurred while appellant was still a Justice of the Peace, and although the prostitute was a former client, he told her that he was not then advising her as her lawyer. As a Justice of the Peace he was entitled to practice law, and this is the basis for his self-contradictory assertion that his conversations with the prostitute were privileged as between attorney and client. The sole source of the evidence consists of telephone conversations between appellant and the prostitute, all of which were intercepted under eavesdropping orders obtained to survey the telephone of the prostitute.

Under the recent holding in *Berger* v. *New York,* 388 U.S. 41, the statute under which the eavesdropping orders were obtained was condemned as unconstitutional. It has been a matter of considerable concern whether any part of the statute survives as to telephone interceptions away from the premises as distinguished from tres-

passory intrusions by electronic listening devices. See *Berger* v. *New York, supra,* 388 U.S. 41, 51-52, 64 [Douglas, J., concurring] 81-82 [Black, J., dissenting].)

But, in any event, the orders in this case were not obtained in accordance with the requirements of the statute. The standard-form affidavits submitted to the court were concededly insufficient in that they failed to specify facts "on which the Judge exercising discretion could act" (*People* v. *McCall,* 17 N Y 2d 152, 157 [which also dealt with the sufficiency of the proof supplied for an order issued under the applicable statute, section 813-a of the Code of Criminal Procedure]; compare the proof in *People* v. *Kaiser,* decided herewith). It is true that the police officer who procured the orders on the several occasions made supplementary oral statements under oath to the issuing Justices. These statements, however, were not recorded and, hence, did not become "part of the record basis of the order" (*People* v. *McCall, supra,* 17 N Y 2d at 158). The *McCall* case indicated that "as in the case of search warrants, there is a significant need for an adequate factual basis on which the Judge will be able to decide whether or not the order or warrant [pursuant to section 813-a] will issue" (*id.* at 159). In another but analogous context this Court has held that oral testimony, taken pursuant to section 794 in support of the grant of a search warrant, "should" be "recorded" (*People* v. *Schnitzler,* 18 N Y 2d 457, 461). On this basis alone, it is concluded, without the necessity of reaching the issue raised under the *Berger* case, *supra,* that the wiretaps in this case were illegal and therefore the evidence obtained therefrom unusable.

The first charge is thus undermined if appellant has standing to object to the illegality of the wiretaps. True, appellant was not the subscriber but he was the other conversationalist.

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In *Goldstein* v. *United States,* 316 U. S. 114, 120, a similar issue arose in a federal prosecution and the court noted that constitutional limitations against search and seizure under the Fourth Amendment were not involved. It held, however, that the intercepted telephone conversations would be excludable as in violation of section 605 of the Federal Communications Act, but not as to non-parties to the conversations. See, to the same effect, *United States ex rel. Ross* v. *LaVallee,* 341 F. 2d 823, 824 (2nd Circ. 1965), cert. den. 382 U.S. 867. And in *United States* v. *Tane,* 329 F. 2d 848, 852, the Second Circuit held, after citing the *Goldstein* case, that:

> "The word 'sender' is perhaps more appropriately ascribed to one who starts a telegram or letter on its way. In a telephone conversation, the caller and the receiver alternately exchange information, and both parties are senders within the meaning of §605. See United States v. Polakoff, 112 F. 2d 888, 889 (2 Cir. 1940), cert. denied 311 U.S. 653, 61 S. Ct. 41, 85 L. Ed. 418 (1940). Cf. Rathbun v. United States, 355 U. S. 107, 113, 78 S. Ct. 161, 165, 2 L. Ed. 2d 134 (1957), where Mr. Justice Frankfurter's dissent states explicitly the implicit basis of the majority opinion—that the Court read ' "sender" to mean one of the parties to the communication, whether sender or receiver'."

It would serve no good purpose and only introduce hopeless confusion if the test for standing to object were different under the state statute, assuming that it has survived the onslaught of the ruling in the *Berger* case, *supra,* from that applied to violations of the federal statute. To be sure, *People* v. *McDonnell,* 18 N Y 2d 509,

does not require such identity of standards, although appellant so argues. In the *McDonnell* case it was held that defendant had standing to object to an illegal wiretapping because he was charged with conspiring to have the telephone in another's name when in fact it was for his benefit. On this basis the case may be distinguished from this one in which there is no claim that the telephone was other than the prostitute's.

On the other hand, no ruling in this State precludes recognizing standing in the other party to a telephone conversation to object to its admission on the ground of illegality. Consequently, the test should be the same as that in the federal cases, especially as it involves an instrumentality subject to federal regulation. Moreover, it would be a very tenuous distinction which would respect the privacy of the telephone subscriber but not of the person speaking to him (regardless of who telephoned the other) over a private telephone believed to be secure from unlawful interception.

On this analysis the first charge cannot be sustained. The other issues as to the status in which appellant advised the prostitute and when the advice was rendered need not be reached.

The next charge sustained, denominated the second charge, involves appellant's official conduct as a District Court Judge. In an action to recover $107 for property damage arising from an automobile collision, appellant caused the defendant, a woman, to be confined to a cell for an interval during a day when she refused to disclose the name of the owner of the automobile involved in the collision. She had been mistakenly sued because the automobile, of unknown ownership or operation, had been driven out of her driveway, evidently by a guest. She

was not a witness and had not been sworn. It was charged that appellant sought to coerce the disclosure from her and summarily directed the court officer to take her into custody, which appellant admits, and to place her in a cell, which he denies. The woman and a court attache testified to the incarceration and the direction by appellant, thus contradicting so much of appellant's testimony as denied giving the direction. There is substantial evidence, therefore, to support the charge and it was reasonable for the Appellate Division to consider such high-handed and oppressive conduct as a ground for imposing a sanction.

The Appellate Division also sustained the charge of imposing grossly excessive bail. In the case of an alleged burglar, appellant fixed bail in the aggregate amount of $1,500,000, with the avowed purpose of preventing the criminal defendant from obtaining his freedom. This charge, denominated the fourth charge, arose from events which occurred while appellant was a District Court Judge. Although the court sustained the charge, it also held that it did not consider the conduct sufficient cause for removal. Eventually, the alleged burglar was released on $7,500 bail fixed in another court. Since the Appellate Division did not consider this charge cause for removal it is unnecessary to discuss it at length, except to note that the charge was supported by substantial evidence and was all but conceded.

The Appellate Division sustained a charge, denominated seventh, accusing appellant of injecting himself improperly into the acceptance of a plea of guilty before the return day of a traffic summons, without having been assigned to the court in which the summons was returnable and without having before him the counterpart papers customary in disposing of a traffic summons. The defend-

ant was a newspaperman, a friend well known to appellant, and one who had occasion to write articles concerning the appellant. A fine of $10, suspended, for speeding as a first offense, was imposed and the defendant's license endorsed with the conviction.

These last events occurred while appellant was a District Court Judge and during a period when, according to a considerable amount of testimony offered by appellant, there was a loose practice among the District Court Judges in handling traffic summonses in advance of the return days to accommodate defendants who would find it inconvenient to appear in court on the return days. Be that as it may, under the rule in the *Droege* case, 197 N.Y. 44, *supra,* the matter of cause is one for the determination of the Appellate Division. If this were the only charge involved, however, upon which a grave sanction was imposed, a serious question of the rationality of the disposition would be presented.

The next charge sustained, denominated ninth, involves conduct while appellant was a Justice of the Peace. In September, 1962 appellant instructed the court attache to obliterate docket entries directing the entry of a default judgment against the tenant in a landlord-tenant summary proceeding, without notice to the landlord's lawyer, on a telephoned statement by the tenant's lawyer that there had been no notice of the trial date. The witnesses and appellant testified that on no view of the matter should the entries have been obliterated but only cancelled. Significantly, appellant testified in contradiction to the court witnesses that he had not directed the obliteration, and in contradiction of an affidavit he himself had made in an official investigation of the occurrence. The charge was supported, of course, by substantial, if not overwhelming, evidence. Appellant, however, raises the question whether

conduct prior to his election to the District Court may be considered.

As a general rule conduct of officials prior to their incumbency may not base disciplinary actions against them (see, generally, 67 C.J.S., Officers, §60[c], which notes, however, that an exception exists as to conduct that may result in debarment from future office, the situation here under section 132 of the Code of Criminal Procedure). Moreover, it has been held that subsequent election to office does not bar charges on prior conduct affecting "general character and fitness for office" (*Matter of Abare* v. *Hatch*, 21 A D 2d 84, 86; *Matter of Newman* v. *Strobel*, 236 App. Div. 371, 373-374). Nor is it material that the cited cases involved conduct during prior terms for the same office when, as here, the prior office is of the same generic character and carries judicial responsibility. It would be an unseemly and unsound distinction with respect to a matter affecting general character and fitness to immunize a judge from his prior misconduct as a judge of lesser or higher rank.

The final charges, denominated tenth and sixteenth, sustained by the Appellate Division, are based on appellant's conduct as a District Court Judge in displaying overt prejudice against an attorney of record in two cases before him and in bringing untoward pressure to bear upon trial counsel in abusive and improper language. Appellant sought to compel trial counsel in chambers to stipulate to the amount of property damage in a tort case and, when he refused, stated:

> "Look, if you don't stipulate to the property damage, and if you don't accomplish something on cross examining that expert, I'm going to let that jury know that you are the person responsible for delaying this trial."

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and

"Listen, when we go out there I'm going to screw you every way I can short of reversible error."

In another case, in connection with a calendar dispute, appellant told another trial counsel acting for the same attorney of record that he had it "in" for the office of the attorney of record and that he had had it "in" for that office for a long time. Appellant admitted to having these verbal altercations but denied the form of the language attributed and contended that his fairness was shown by the fact that the aggrieved lawyers had won both their cases. The Appellate Division held that appellant's conduct showed "a pattern of unjudicial conduct on both occasions." The evidence supports the charges substantially and is well within the range to support a finding of cause for the imposition of sanctions.

Involved in the hearing below was appellant's claim of his privilege against self-incrimination and the attorney-client privilege. The court placed great stress on his assertion of privilege and relied on holdings in this Court and the United States Supreme Court which distinguish between the availability and the effects of a claim of privilege against self-incrimination by a public official in a disciplinary proceeding and the effects of such claims in any subsequent criminal proceeding against him (*Mtr. of Gardner* v. *Broderick*, 20 N Y 2d 227 and *Garrity* v. *New Jersey*, 385 U.S. 493; cf. *Spevack* v. *Klein*, 385 U.S. 511). These claims of privilege arose, however, only in connection with the first charge and, hence, it is no longer necessary to consider them if the view expressed as to the first charge is adopted. If, however, the first charge survives, then, indeed, these issues become material, and for the reasons stated in the *Gardner* case,

supra, the claim of privilege with regard to matters otherwise available as charges for prior misconduct while holding a judicial office, might properly have been considered cause for removal by the Appellate Division.

Appellant also argues that there is an absence of standards for removal; that the court sat as charge-maker, prosecutor, and trier of the facts; and that the court had previously demonstrated prejudice against appellant, for which reason it should not have tried the matter. These are contentions that go to the traditional nature of removal proceedings and at this late date do not merit discussion.

Abstracting from the case the first charge (involving the dealings with the prostitute) and the claims of privilege associated with that charge would take away a substantial part of the basis upon which the Appellate Division acted. Consequently, the matter should be remanded to the Appellate Division to reconsider this aspect of the proceed-

[redacted] proper evidence, the sanction to be imposed for the remaining charges sustained.

Accordingly, the order of the Appellate Division should be reversed; the proceeding remanded to that court; the first charge should be dismissed by that court unless other untainted evidence can be supplied to support it; and that, if the first charge be dismissed, the Appellate Division should reconsider the disposition to be made on the basis of the remaining charges.

* * *

Order reversed and matter remitted to the Appellate Division, Second Department, for further proceedings in accordance with the opinion herein. Opinion by Breitel, J.

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All concur, Fuld, Ch. J., as to the first charge on the additional ground that in consequence of the decision in *Berger* v. *New York* (388 U.S. 41), §813-a of the Code of Criminal Procedure is unconstitutional in its entirety "on its face" (p. 55); that no authorization existed for an *ex parte* order permitting eavesdropping, i.e. wiretapping; and that the conversations intercepted by such wiretapping should not have been received in evidence. (See dissenting opinion, *People* v. *Kaiser,* 20 NY 2d ——, also decided today.) Bergan J. taking no part.

Appendix C

SUPREME COURT, APPELLATE DIVISION,
SECOND JUDICIAL DEPARTMENT.

Brennan, Acting P.J., Rabin, Hopkins and Benjamin, JJ.

In the Matter

of

THE PROCEEDINGS AGAINST SUFFOLK COUNTY DISTRICT COURT JUDGE FLOYD SARISOHN,

Respondent.

PROCEEDING to remove respondent from office as a Judge of the District Court of Suffolk County for cause.

Frederic Block for the respondent.

Solomon A. Klein, counsel appointed to prosecute the proceeding.

PER CURIAM:

On May 15, 1967 this court, after a hearing, removed respondent for cause from his office as Judge of the Suffolk County District Court and prohibited him from thereafter holding judicial office, appointive or elective, based on findings that he was guilty of the second part of charge 1, and charges 2, 7, 9, 10 and 16, as contained in the original and supplemental statements of charges, and his invocation at the hearing of his constitutional privilege against self-incrimination (*Matter of Sarisohn*, 27 A D 2d 466).

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On appeal to the Court of Appeals, that court on December 7, 1967 found that the evidence in support of the second part of charge 1 was inadmissible because it consisted of intercepted telephone conversations based on eavesdropping orders not obtained in accordance with the requirements of the statute (Code Crim. Pro., § 813-a). The Court of Appeals thereupon remanded the matter to this court with instructions to dismiss the first charge unless other untainted evidence could be supplied to support it and, if the charge be dismissed, to reconsider the disposition to be made on the basis of the remaining charges (—— N Y 2d ——).

Counsel appointed to conduct the proceeding has stated to the court that no evidence independent of the wiretaps exists to support the second part of charge 1 and has moved (as has respondent) to dismiss charge 1. That motion is granted.

Charge 2 was that respondent, while a District Court Judge, sought to coerce the disclosure from a woman defendant, mistakenly sued in a property damage action, the name of the owner of the automobile involved in the collision in question and summarily directed a court officer to take her into custody (prior to the trial of the action) and to place her in a cell, from which incarceration she was subsequently released by order of the court clerk. The Court of Appeals, in affirming the finding of guilt on this charge, held that there was substantial evidence to support the charge and characterized respondent's conduct as "high-handed and oppressive".

Charge 7 was that respondent, while a District Court Judge, improperly injected himself (contrary to the express instructions of the Presiding Judge of the District Court) into the acceptance of a plea of guilty before the

return day of a traffic summons, without having been assigned to the court in which the summons was returnable, and without having before him the counterpart papers customary in disposing of a traffic summons. The Court of Appeals affirmed the guilty finding on this charge.

The proof as to charge 9 was that respondent, while a Justice of the Peace of the Town of Smithtown, ordered a court attache to obliterate docket entries directing the entry of a default against the tenant in a landlord-tenant summary proceeding, without notice to the landlord's lawyer. This court's finding of guilt on this charge was based in part on an affidavit made by respondent in a proceeding shortly after the occurrence, although his testimony at the hearing directly contradicted the affidavit. The Court of Appeals held that this charge was supported by substantial, if not overwhelming, evidence and that this conduct affected respondent's general character and fitness for office as District Court Judge.

Charges 10 and 16 were that respondent, while a District Court Judge, displayed overt prejudice against an attorney of record in two cases before him (as to one on November 12, 1964 and the other on March 31, 1965) and in bringing untoward pressure to bear upon trial counsel in abusive and improper language. This court, in finding both charges sustained, stated that respondent had shown a pattern of unjudicial conduct on both occasions. The Court of Appeals held that the evidence substantially supported these two charges.

The Court of Appeals held that each of charges 2, 7, 9, 10 and 16 was substantial cause for the imposition of sanctions, although it stated that there would be serious question whether charge 7, standing alone, would warrant the imposition of a grave sanction.

Appendix C

This court stated in its opinion of May 15, 1967 that "cause" sufficient to justify removal of a judge of an inferior court has been defined as acts "including corruption, general neglect of duty, delinquency affecting general character and fitness for office, acts violative of law inspired by interest, oppressive and arbitrary conduct, reckless disregard of litigant's rights, and acts justifying 'the finding that his future retention of office is inconsistent with the fair and proper administration of office'" (*Matter of Kane v. Rudich,* 256 App. Div. 586, 587).

We are in agreement with the Court of Appeals that charge 7, standing alone, would not warrant the imposition of a grave sanction. However, in our opinion, respondent's guilt of charges 2, 7, 9, 10 and 16, considered together, comes within the compass of "cause" as thus defined and is sufficient ground not only for the removal from his office as a District Court Judge, but also for prohibition from holding judicial office, appointive or elective. In arriving at this conclusion, we have completely disregarded charge 1 (which has been dismissed) and respondent's claim of privilege (which arose solely in connection with charge 1).

Respondent should be removed from his office as Judge of the Suffolk County District Court, *nunc pro tunc* as of May 15, 1967, and should be prohibited from thereafter holding any judicial office, appointive or elective.

BRENNAN, Acting P.J., RABIN, HOPKINS and BENJAMIN, JJ., concur.

APPENDIX D

Judgment Sought to Be Reviewed

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 14th day of June in the year of our Lord one thousand nine hundred and sixty-eight, before the Judges of said Court.

WITNESS,

THE HON. STANLEY H. FULD,
Chief Judge, *Presiding.*
RAYMOND J. CANNON,
Clerk.

REMITTITUR, June 14, 1968.

---

2. No. 243. 68

In the Matter of

the Proceedings against Suffolk County District Court Judge, FLOYD SARISOHN,

Appellant,

THE APPELLATE DIVISION OF THE SUPREME COURT, SECOND DEPARTMENT,

Respondent.

BE IT REMEMBERED, That on the 9th day of May in the year of our Lord one thousand nine hundred and

sixty-eight, Floyd Sarisohn, the appellant in this cause, came here unto the Court of Appeals, pro se, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And the Appellate Division of the Supreme Court, Second Department, the respondent in said cause, afterwards appeared in said Court of Appeals by Solomon A. Klein, its attorney.

Which said Notice of A peal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Floyd Sarisohn, pro se, for the appellant, and by Mr. Solomon A. Klein, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs. And thereafter a motion to amend the remittitur having been granted this remittitur is hereby amended by adding thereto the following: Upon the appeal herein there were presented and necessarily passed upon the following questions under the Constitution of the United States: (1) whether appellant was deprived of due process and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, and (2) whether subdivision i of section 22 of Article 6 of the Constitution of New York State, subdivision e of section 103 of the Uniform District Court Act of the State of New York, and section 132 of the Code of Criminal Procedure of the State of New York violated the Fourteenth Amendment to the Constitution of the United States. The Court of Appeals held that there was no violation of the Fourteenth Amendment to the Constitution of the United States.

Appendix D

And it was also further ordered, that the record aforesaid, and the proceedings in this Court. be remitted to the Appellate Division of the Supreme Court, Second Judicial Department, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Second Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, June 14, 1968.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk.

SUPREME COURT, U. S.

FILED
FEB 15 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 913

FLOYD SARISOHN,

Petitioner,

—against—

THE APPELLATE DIVISION OF THE SUPREME COURT, SECOND DEPARTMENT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

SOLOMON A. KLEIN
Counsel for Respondent
16 Court Street
Brooklyn, New York

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IN THE

Supreme Court of the United States

October Term, 1968

No. 913

FLOYD SARISOHN,

Petitioner,

—against—

THE APPELLATE DIVISION OF THE SUPREME COURT, SECOND DEPARTMENT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner seeks review of the judgment of the New York Court of Appeals, highest court of the State, which affirmed unanimously the judgment of the Appellate Division of the Supreme Court, Second Judicial Department, directing that petitioner be removed from judicial office as a Judge of the Suffolk County District Court and be barred from holding judicial office thereafter.

Opinions Below

The opinion of the Court of Appeals, rendered on petitioner's first appeal to that court, is reported in 21 NY 2d 36. The final decision on petitioner's second appeal is reported without further opinion in 22 NY 2d 808. The opinions of the Appellate Division are reported in 26 AD

2d 388; 27 AD 2d 466; and 29 AD 2d 91. A related opinion by the United States District Court for the Eastern District of New York is reported in 265 F. Supp. 455.

Jurisdiction

The judgment of the New York Court of Appeals was entered on June 14, 1968. Rehearing was denied on October 9, 1968. The petition for a writ of certiorari was filed on January 6, 1969. The jurisdiction of this Court is invoked by petitioner under Title 28 U.S.C. §1257(3).

Question Presented

Whether petitioner—who was removed and barred from holding state judicial office after due notice of the charges and, as found by the highest court of the State, after "a full hearing" conducted by the Appellate Division "with meticulous fairness"—has any legitimate basis for his claim that he was "denied a fair hearing before an impartial tribunal in violation of his rights, privileges and immunities under the Fourteenth Amendment."

State Constitution and Statutory Provisions Involved

New York State Constitution, Article 6, Section 22, Subdivision i.

"A judge of the courts for the city of New York established pursuant to section fifteen of this article, of the district court or of a town, village or city court outside the city of New York may, in the manner provided by

law, be removed for cause or retired for disability after due notice and hearing by the appellate division of the supreme court of the judicial department of his residence."

Uniform District Court Act, Section 103, Subdivision (e)

"The appellate division of the supreme court may remove a judge of the district court for cause or retire him for disability after due notice and hearing, under such procedures as may be established by law."

Code of Criminal Procedure, Section 132

"A judge of the courts for the city of New York established pursuant to section fifteen of article six of the constitution, of the district court or of a town, village or city court outside the city of New York may be removed for cause or retired for disability, as provided by the constitution, by the appellate division of the supreme court. The appellate division may in its discretion prohibit a judge or a justice so removed from holding public office, elective or appointive, thereafter. The appellate division shall have power to order the proofs upon any proceedings hereunder to be taken by a referee to be appointed by such appellate division. . . . The appellate division shall also have power on its own motion, or on petition, to investigate or cause to be investigated, the said inferior courts, and the judges or justices thereof, and to designate a justice of the supreme court or to appoint a referee to conduct such investigations, the reasonable expenses thereof to be certified and made a charge in the manner hereinbefore provided."

Statement of the Case

The State Constitution, quoted above, vests jurisdiction to remove a judge of the district court "after due notice and hearing by the appellate division of the supreme court of the judicial department of his residence." Pursuant thereto, five Justices of the Appellate Division, Second Judicial Department, were convened as a court of original jurisdiction to determine the issues raised with respect to nine charges of alleged misconduct by petitioner. Nine other charges had previously been stricken from consideration by the court "without passing on their merits or sufficiency" (Op. Item 12).*

The trial lasted a full week, at which petitioner appeared with counsel, called witnesses in his defense, and testified in his own behalf—except that he refused to testify with respect to the first charge, claiming privilege against self-incrimination and attorney-client privilege (OP. Item 15; *Matter of Sarisohn*, 21 NY 2d 36, 47).

After completion of the trial the court dismissed two of the charges and part of another for insufficiency of evidence, and on the remaining charges found petitioner guilty of a pattern of misconduct which in the court's opinion made it "imperative that [petitioner] no longer be permitted to pass judgment on the rights of litigants" (OP. Item 18; *Matter of Sarisohn*, 27 AD 2d 466, 472).

Petitioner's wrongdoing to the detriment of litigants, counsel, and the integrity of official court records constitutes the factual basis upon which the final judgment of the Court of Appeals rests. On petitioner's first appeal the

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* References preceded by the symbol "OP." refer to the original papers transmitted by the Appellate Division to this Court and itemized in the schedule annexed thereto.

Court of Appeals reviewed the entire case both as to facts and law. The Court found that petitioner had received "a full hearing"; that the Appellate Division had conducted the proceedings "with meticulous fairness"; and that six of the charges—exclusive of the first charge—were established by substantial evidence "well within the range to support a finding of cause for the imposition of sanctions" (*Matter of Sarisohn,* 21 NY 2d 41, 44-47).

With respect to the first charge, as to which petitioner had refused to testify under claims of privilege, the Court of Appeals held that the evidence was inadmissible because it consisted of recorded telephone conversations obtained without complying with the requirements of the New York statute (*Id.* at 42-44). Accordingly, the Court remanded the matter to the Appellate Division with instructions to dismiss the first charge unless other untainted evidence could be supplied to support it; and that, if the first charge be dismissed, to reconsider the disposition to be made "on the basis of the remaining charges" (*Id.* at 48).

After due notice to petitioner and his counsel, who appeared and argued on behalf of petitioner, the court dismissed the first charge and reserved decision to determine the disposition to be made (OP. Item 25). The court then wrote an opinion stating that it completely disregarded the first charge as well as petitioner's claim of privilege; and that petitioner's guilt of the charges sustained by the Court of Appeals "is sufficient ground not only for the removal from his office as a District Court Judge, but also for prohibition from holding judicial office, appointive or elective" (29 AD 2d 91, 93).

The Court of Appeals affirmed unanimously without further opinion (22 NY 2d 808).

REASONS FOR DENYING THE WRIT

An examination of the petition in light of the actual record reveals that petitioner's contention that he was denied a fair trial before an impartial tribunal is propped upon unfounded assumption, creating synthetic issues of deprivation of due process of law.

1.

At page 14 of the petition it is asserted that the Appellate Division:

> ". . . went through the motions of conducting much of the proceeding with superficial 'meticulous fairness'."

And at page 17 the petition charges that the Appellate Division was corrected by the Court of Appeals:

> "for deliberately allowing 'concededly' illegal evidence to form the basis of its finding of guilt."

These are baseless accusations in shocking conflict with the position taken by petitioner's counsel, Mr. Frederic Block, in presenting his contentions at the hearing on the remand. This is what Mr. Block said to the Appellate Division:

> "I would like to note initially that the Court of Appeals did hear and did consider the question of disqualification. I fully concur with the characterization of the proceedings before this honorable bench by the Court of Appeals, that it was conducted with meticulous fairness . . . We do not make the assertion that there is a bias or prejudice as a matter of fact. I don't think that exists. I am confident that it doesn't.

Justice Benjamin: You are contesting the general pattern of the removal proceeding?

Mr. Block: Yes, I am claiming that the procedure established by the Constitution and the statutes is basically violative of constitutional rights" (OP. Item 25, at 17-18).

2.

Another issue sought to be raised by the petition is that the Appellate Division "became personally interested in the outcome, by preferring, as cause for removal" a charge that petitioner had made statements to the press discrediting "all the judges of the Appellate Division and the Court itself"; and that the Appellate Division "predetermined [that the charge] would constitute cause for petitioner's removal from office" (Pet. 5, 11, 14, 16).

This is a fictitious issue. The fact is that the Appellate Division never made any determination, preliminary or otherwise, with respect thereto. Its order instituting the preliminary investigation is dated August 12, 1966; it thus could not have been based upon petitioner's statements to the press made subsequently between August 15 and August 20, 1966 (OP. Items 1 and 2).

Moreover, the Appellate Division struck out that charge together with eight other charges and deleted them from consideration without passing upon either their merits or sufficiency (OP. Item 12).

Finally, it would be a unique device if one who is subject to the supervision of a court could disqualify every Justice thereof simply by making statements to the press disparaging the court.

3.

The petition is replete with assertions and argument as to the tapped telephone conversations and petitioner's claim of privilege against self-incrimination in connection therewith. This is a non-existant issue. As heretofore noted the Appellate Division dismissed the charge and completely disregarded the claim of privilege in accordance with the decision of the Court of Appeals.

4.

Petitioner further contends that the Appellate Division acted as grand jury, prosecutor and judge; and that the provisions of the State Constitution and statutes authorizing removal for "cause" is vague and indefinite in violation of due process of law.

These contentions are not new. They were raised and rejected in *Matter of Friedman,* 12 NY 2d (a), appeal dismissed 375 US 10; *Matter of Osterman,* 13 NY 2d (a), cert. denied 376 US 914; *Matter of Kane* v. *Rudich,* 256 App. Div. 586; *Matter of Newman* v. *Strobel,* 236 App. Div. 371.

Petitioner made the same contentions in a separate action brought in the United States District Court for the Eastern District of New York before the trial in the instant proceeding. The opinion, rejecting his contentions, contains a thorough discussion of the decided cases and demonstrates the insubstantiality of the issues sought to be raised. *Sarisohn* v. *Appellate Division,* 265 F. Supp. 455.

5.

Petitioner's complaint (Pet. 11) that the Appellate Division "discharged the impartial referee it had appointed to

conduct the hearing . . . and substituted itself for the impartial referee" needs little discussion.

The record shows that the Appellate Division referred the matter to Hon. Daniel Gutman, Dean of the New York Law School, as Referee to hear the proofs on the issues presented and to deliver to the court a certified transcript of the hearings. This was done in accordance with the procedure authorized by section 132 of the New York Code of Criminal Procedure.

Petitioner, however, objected to the reference. The Court therefore vacated the order of reference and designated five Justices of the Court to hear and determine the issues.

6.

Finally, a reading of the record and opinions of the Court of Appeals and the Appellate Division shows that the judgment removing and barring petitioner from holding judicial office rests upon adequate State grounds, and that petitioner was not deprived of any right guaranteed to him by the Federal Constitution (See *Wilson* v. *North Carolina,* 169 US 586).

CONCLUSION

For the foregoing reasons, certiorari should be denied.

Respectfully submitted,

SOLOMON A. KLEIN
Counsel for Respondent

SUPREME COURT, U. S.

FILED

FEB 26 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 913

FLOYD SARISOHN,

Petitioner,

—against—

THE APPELLATE DIVISION OF THE SUPREME COURT, SECOND DEPARTMENT,

Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

1. In Point 5 of its brief, the respondent states that it discharged the impartial referee because the petitioner "objected to the reference." This is not true.

The objection was interposed, as the respondent itself acknowledged (A99), because respondent was charged with being an "interested party" and did not confer upon the referee any powers to make findings or to render any report (A99).

Thus, petitioner's objection was to the nature of the reference in that the accused "interested party", the respondent Court, did not divest itself from the decision-making process, but simply constituted the impartial referee as nothing more than a human tape-recorder.

After the petitioner interposed such a challenge and contested the respondent's right to pass judgment (A99a), the respondent discharged the referee and appointed itself to conduct the hearing because of what it stated to be "the need for expeditious administration of justice" (A100-A101) and not, as the respondent would like this Court to now believe, because the petitioner objected to the reference.

2. That part of the proceeding which the respondent quotes at the bottom of page 6 of its brief is taken out of context. The portion omitted by the three dots (. . .) does not refer to the completion of a sentence, but represents a full page of the record wherein the petitioner's counsel argued the issue of implied bias as a matter of law. For the Court's convenience the omitted colloquy is reproduced in Appendix A hereto (p. 4).

When read in proper context, the improperly quoted excerpt contains petitioner's thesis that the measure of procedural due process is not whether personal bias existed as a pure question of fact, but whether the re-

spondent, as a matter of law, was capable of affording the petitioner procedural due process in light of the totality of its involvement in this proceeding.

The issue thus, is not whether the respondent conducted the hearing with "meticulous fairness" or in any other mode, but whether it had the constitutional right to pass judgment at all.

As acknowledged by the New York Supreme Court in the related case of *Sarisohn* v. *Dennison,* 53 Misc. 2d 1081, 1084; 281 N.Y.S. 2d 475, 478, "Simply because the removal proceeding was conducted outside a familiar framework does not negate the manifest position of Sarisohn on the one side and the Appellate Division on the other, adversaries in that proceeding regardless of its characterization."

Petitioner's position before this Court is consistent with his position at every stage of the proceedings—that procedural due process of law means more than whether the respondent can be proven, factually, to be biased. Petitioner contends that the respondent could not afford its target procedural due process of law when it was so inextricably linked to every phase of this judicial removal proceeding.

Respondent's brief consequently fails to address itself to the essential issue of whether procedural due process of law extends to a judicial officer in the course of a judicial removal proceeding, or whether the respondent's "need for expeditious administration of justice" (A100-A101) can constitutionally justify the final solution in this case.

3. Point 4 of the respondent's brief suggests that this Court previously has rejected contentions that the concept of "cause" as contained in the pertinent state constitutional and statutory language is indefinite and vague

and hence violative of substantive due process of law. The petitioner takes issue with the respondent's interpretation of this Court's denial of *certiorari* in *Osterman* and the dismissal of the appeal in *Friedman,* as reflecting substantive adjudications by the Court to this effect.

The danger in permitting the respondent the latitude to perceive itself as the arbiter as to what constitutes "cause" for removal of a judicial officer in the absence of the establishment of definitive standards is strikingly portrayed by the respondent's recent decision this past December 31st in *Matter of Schmidt,* 31 A.D. 2d 214, a copy of which is appended hereto as Appendix B.

Schmidt is the President Judge of the Suffolk County District Court and was one of respondent's principle witnesses in petitioner's trial. The petitioner invites the Court to compare the Schmidt decision with his decision (Petition, Appendix C, pp. 45a-48a) and to find any common standard or definition of "cause" which permitted the respondent to conclude that Schmidt's misconduct "was not of such gravity as to justify the extreme penalty of removal from office" (Appendix B herein, p. 10) while the petitioner's misconduct justified not only his removal from office, but his unprecedented preclusion for life.

Respectfully submitted,

FREDERIC BLOCK
Counsel for Petitioner

[APPENDIX FOLLOWS]

APPENDIX A

. . . We raised the question of an implied bias as a matter of law, not to impugn upon the fairness of the Court whatsoever, but we felt that the whole removal procedure that has historically, as the Court of Appeals has indicated, been followed by this Court is suspect in the light of recent decisions by the United States Supreme Court.

These arguments have been presented before this Court. They were repeated before the Court of Appeals. The Court of Appeals upheld the procedure on the theory, as I glean from the language of the Court, that it has been the traditional way, and it struck the Court as late in the history of tradition to reconsider the nature of removal proceedings.

Justice Benjamin: Do I understand, Mr. Block, then that this objection is not ad hominem to this Court but merely for the purpose of preserving your possible constitutional rights?

Mr. Block: Certainly, Judge Benjamin, we want to preserve the subsequent constitutional arguments, if needed.

Justice Benjamin: But I understand you to say it is not—

Mr. Block: It would apply, of course, to any court that would be passing upon the removal proceeding.

Justice Benjamin: It is not by reason of the fact that these four justices chance to be the Court?

Mr. Block: No, I am claiming, as a matter of law. . . .

Appendix B

In the Matter of Proceedings in relation to Lincoln G. SCHMIDT, President Judge of the District Court of Suffolk County, Respondent.

Supreme Court, Appellate Division, Second Department.

PER CURIAM. Dec. 31, 1968.

By order of this Court made on May 17, 1967 Mr. Justice Thomas P. Farley was designated to conduct an investigation of the District Court of Suffolk County. Upon the submission of his report, this Court found that sufficient cause existed for the institution of a proceeding (pursuant to N.Y.Const. art. VI, § 22, subd. i; UDCA, § 103; subd. [e]; Code Crim.Proc. § 132) to remove respondent, President Judge of the District Court of Suffolk County, from office for cause.

There were four charges in the original statement of charges served upon respondent; thereafter, ten additional charges were preferred against him. There is no basic dispute as to the material facts. In his answer to the original four charges, respondent substantially conceded all of the factual allegations of these charges but pleaded for "Leave to show extenuating and mitigating circumstances" with respect to each of them. As to the additional ten charges respondent, in his answer and in his testimony at the hearing before this Court, has similarly conceded the factual occurrences, but has denied any impropriety in connection therewith.

CHARGES

It is alleged in the first charge of the statement of charges that in the prosecution of a truck driver for a violation of section 385 of the Vehicle and Traffic Law, the driver having discharged his attorney and the owner of the truck having sent the driver home from court, respondent directed that the owner be taken into custody until an appropriate information charging the owner with a violation of said section could be drawn against him. It was charged that the respondent's actions with respect to the owner, in directing that he be placed in custody, as a result of which the owner was handcuffed in the courtroom, constituted "improper, high-handed and oppressive conduct". It was further charged that the imposition by respondent of fines in the amount of $100 on each of five violations was contrary to and in violation of subdivision 16 of section 385 of the Vehicle and Traffic Law.

As alleged in the statement of charges and as developed at the hearing, it appears that in 1966 Paul Jackson, a truck driver employed by William A. Thompson, the owner of the truck, was given five summonses for driving an overloaded truck in violation of section 385 of the Vehicle and Traffic Law. In November, 1966, the driver was found guilty before the respondent with respect to two of the five violations and was fined the minimum amounts mandated by the statute, to wit: $100 for the first offense and $250 for the second offense.

On December 9, 1966, with a third case marked peremptorily for that date, the driver, his attorney and the owner of the truck appeared before the respondent on the third violation. The attorney asked the respondent to disqualify himself on the ground that he had previously heard two cases involving the same defendant, the same truck and the same conditions and that he might thereby be prejudiced. The motion was denied. Subsequently that day, the attorney moved to withdraw as counsel because of a dispute as to his fee. Respondent told Jackson that he would give him a short time to obtain an attorney and proceed to trial at 1:30 P.M., since the file indicated that the case had been continuously adjourned and had been marked peremptorily against him. When the court reconvened at 1:30 P.M., Thompson advised respondent that he had been unable to find an attorney and that he had sent Jackson home because he had complained of being ill. Thereupon, respondent directed that Thompson be placed in custody for the purpose of having an information drawn against him as the owner of the vehicle. Thompson was led from the courtroom with one wrist handcuffed.

Respondent testified that when he ordered the owner of the truck to be taken into custody for the purpose of having an information drawn against him, he believed that a prosecution for violation of the statute would properly lie against him as owner. However, during the recess, he was advised by the Assistant District Attorney that the charge could not be successfully prosecuted against the owner because of the difficulty of proving that he did "knowingly permit" the overweight violation. Thereupon, Thompson was released from custody, and in February, 1967 he appeared in respondent's chambers and delivered a check for $500 in full payment of all five violations. Respondent reduced the original $250 fine for the second overload violation and imposed $100 fines for each of the three remaining overload violations. Respondent testified that, at that time, it was not uncommon for a judge of said court to impose fines of less than $250 for second or subsequent offenses although the statute provided for a fine of not less than $100 for a first offense and not less than $250 for a second or subsequent offense. He explained that the administrative problems of processing the work through the court had, unfortunately, led him "to cut corners in some cases to get the work done and this was one of them".

The second charge, as amended, relates to a summons for speeding which one, Richard Felice received on January 6, 1966, returnable on February 16, 1966 in Patchogue. Felice did not appear on February 16th and, although respondent was not assigned to Traffic Court in Patchogue on that day, nevertheless, he dismissed the case for lack of prosecution and endorsed the dismissal on the back-up sheet. While admitting these facts, respondent denied that it was "improper, irregular and contrary to the orderly administration of justice"

Respondent testified that on the day in question he left the court in Commack, where he had been presiding, and, in accordance with his usual practice, brought with him certain court records to be filed in Patchogue. At the court house in Patchogue, where he arrived after 4:30 P.M., he was given the file in the Felice case and a clerk requested that he initial the dismissal so that the books could be closed for that day. Seeing a notation on the summons and back-up sheet indicating that the defendant had been advised of his right to counsel and of the provisions of section 335-a of the Code of Criminal Procedure and that the case had been adjourned to February 16, 1966, and being advised by a clerk that the case had been dismissed earlier that day by the judge who had presided in traffic court, but who had failed to appropriately mark the papers, respondent made the notation as above indicated dismissing the case.

The third charge, as amended, alleges that in 1965 one Joseph Gauch received a summons for passing a red light, which was returnable in Patchogue on December 22, 1965. The defendant did not appear on that day; however, he did appear in court late in the afternoon of the following day, December 23rd. The judge assigned to traffic court on that day had already left when Gauch arrived and Gauch was referred to respondent, who had just entered the building. Respondent asked Gauch how he pleaded. Gauch pleaded guilty and handed his driver's license to respondent. Respondent looked at the license and dismissed the charge. Respondent has admitted these facts but has denied that such disposition was "contrary to the proper and orderly administration of justice".

At the hearing before this Court Gauch testified that when he arrived at the court building on December 23, 1965 he was referred by a police sergeant to respondent; that he explained to respondent that he had passed a red light in order to avoid an accident and that if he had stopped, the automobile coming up behind him would have hit him; and that upon hearing this explanation, respondent signed the summons and said "Here, Merry Christmas". Respondent conceded, at the hearing, that he was "carelessly wrong" in dismissing the charge in the absence of the police officer who issued the summons.

The substance of the fourth charge is that respondent became involved in a bitter matrimonial dispute between one of his wife's sisters and her husband (William King). On September 27, 1965, respondent signed a complaint against his brother-in-law, charging him with disorderly conduct. That charge was dismissed in July, 1966 for lack of prosecution. On September 6, 1966, respondent signed an arrest warrant upon the complaint of another one of his wife's sisters, whose husband had been taken to the hospital earlier that day suffering from a heart

attack allegedly caused by the action of King, charging King with trespass. Respondent admitted this charge.

At the hearing the desk officer who had been at the police station testified that he had first attempted to call two Justices of the Peace to sign the arrest warrant, but when he was unable to contact either one of them he called respondent at the insistence of the complainant. There was also testimony to the effect that there was a real possibility of a continuing breach of the peace and that the legend "Bench Warrant * * No Bail Application * * * Hold for appearance before Justice", which appeared on the warrant, was placed there by the desk officer of his own volition after respondent had signed the warrant.

Charges 5 to 8, inclusive and 10 to 14, inclusive, of the additional charges are that respondent acted improperly in refusing to grant adjournments to the prosecution before dismissing certain youthful offender cases specified therein for lack of prosecution. Charge 9 alleged that in a certain prosecution the defendant was charged, in separate informations, with the crimes of malicious mischief. Youthful offender treatment was granted and respondent fixed January 26, 1967 as the date for trial. On that date, the Assistant District Attorney requested an adjournment on the ground that two eye-witnesses, friends of the defendant, were not present. Respondent refused to grant an adjournment and forced the case to trial, which resulted in the granting of defense motions to dismiss for failure of proof. With respect to the alleged eye-witnesses, respondent stated: "Let the record show there was a failure of proof on the * * * incident because the supporting witnesses did not appear to testify".

It is not necessary to detail respondent's testimony with respect to these additional charges. However, we note that as to each of them he testified as to the reasons which prompted the action which he took in either dismissing the cases for lack of prosecution or, in the case involved in the ninth charge, in forcing it on for trial.

FINDINGS

[1, 2] As to the first charge, we find that in the *Jackson* case, the pattern of conduct in seeking to disqualify respondent, in relieving the attorney for Jackson and in sending Jackson home without the permission of the court, in a case which had been marked peremptorily against the defendant, indicates that Thompson acted improperly and in a manner intended to frustrate the orderly process of the court. However, we further find that respondent unnecessarily over-reacted to the situation when, in a case involving a violation of the Vehicle and Traffic Law, he ordered Thompson to be placed in custody, as a result of which the latter was led from the court room with one wrist handcuffed. We

are also of the opinion that respondent erred in failing to impose the minimum fines required by the statute for the second and subsequent offenses.

[3] As to the second charge, we find that when respondent marked the case against Felice for speeding "dismissed", he was misled into doing so by the erroneous information which was contained on the back-up sheet and the information which was given to him by a clerk of the court. However, while it appears that respondent's action in marking the case "dismissed" was the result of a mistake, we must note that it would not have happened if respondent had adhered to the proper procedure, in all cases, of having the judge who dismisses or otherwise disposes of a case mark the actual disposition on the necessary papers.

[4] As to the third charge, respondent admitted that his action in dismissing the charge was "carelessly wrong" and we agree. While it appears that if the matter had been properly presented it may have warranted a dismissal in view of the driver's explanation as to why he passed the red light, nevertheless, the question involving the disposition of the traffic summons was not properly before respondent and, in any event, the charge should not have been dismissed without an opportunity being afforded to the police officer to present proof of the violation.

[5] As to the fourth charge, we find that there was a violation of sections 4 and 13 of the Canons of Judicial Ethics, Judiciary Law, Appendix, and of section 14 of the Judiciary Law, which proscribes a judge from participating in any matter in which he is related by consanguinity or affinity to any party to the controversy within the sixth degree. However, in view of the fact that the police had just unsuccessfully attempted to get another judge to issue the arrest warrant and that there was a distinct possibility of a continuing breach of the peace, which had already apparently resulted in the hospitalization of one person, we are of the opinion that there were mitigating circumstances which present an understandable excuse for respondent's misconduct.

[6] As to the fifth to fourteenth charges, inclusive, we believe that respondent may have acted with undue haste in dismissing some of the youthful offender cases for lack of prosecution and, in one instance, in forcing the case to trial although the prosecution was not ready to proceed. However, we find that he acted within the scope of his judicial discretion. We find no proof of improper or ulterior motives on the part of respondent with respect to these charges.

[7] We have indicated our disapproval of certain of respondent's actions and respondent has conceded error in several instances. We

find, however, that the nature of respondent's misconduct was not of such gravity as to justify the extreme penalty of removal from office. In those instances in which he acted improperly, he was not motivated by venality, pecuniary interest or advantage, or other improper objectives. The irregularities which have been found herein are not of such quality as, in our opinion, would warrant the imposition of the judicial sanction of "removal for cause". Accordingly, we direct that he resume his duties forthwith.

[8–10] There is a further matter, however, which merits our consideration. In our determination of the specific charges brought against respondent, certain practices have come to our attention as to which we deem it necessary and appropriate to formally state our views. We believe that, except under extraordinary circumstances, in cases involving traffic violations and other minor infractions, defendants should not be handcuffed and placed in detention cells either during a recess of the trial or while waiting for complaints to be drawn. Furthermore, we disapprove of the practice of imposing less than the minimum fines prescribed by the statute for violations of section 385 of the Vehicle and Traffic Law. We also disapprove of the practice of having a judge other than the one who has disposed of a case make the notation on the necessary papers. It is our view that when a judge takes final action disposing of a case, the required notation should be made by him personally and not by another judge. Finally, we disapprove of the practice of having a judge other than the one assigned to the traffic part dispose of traffic offenses. The disposition of traffic offenses should, at all times, be determined by the judge assigned to the traffic part and no judge should dispose of any matters which do not come within the scope of his assigned responsibilities.

In this proceeding to remove respondent, President Judge of the District Court of Suffolk County, from office for cause (N.Y.Const. art. VI, § 22, subd. i; UDCA, § 103, subd. [e]; Code Crim.Proc. § 132), the proceeding is closed, and respondent is directed to resume his duties forthwith.

This proceeding is closed.